AL SHAMS GLOBAL LIMITED
versus
ZIMBABWE ALLOYS (PRIVATE) LIMITED
and
INTERFIN BANK LIMITED

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 29 November and 1 August 2013

Summary Judgment Application

Advocate *F Girach,* for the applicant
Advocate *L Uriri,* for the respondent

BERE J: The applicant is a company duly registered in the British Virgin Islands and whose principal place of business is in Al Khabaissi, Dubai, United Arab Emirates.

The first respondent is a private limited company duly registered in terms of the laws of Zimbabwe.

The second respondent is a duly registered bank in terms of the laws of Zimbabwe.

This application for summary judgment is pursuant to the notice of appearance to defend filed by the first respondent following the service upon it of summons commencing action by the applicant. The applicant is convinced that the first respondent has no *bona fide* defence to the claim filed by the applicant in the main case hence his application for summary judgment. The second respondent has not entered appearance to defend and is therefore barred. The action for summary judgment is against the first respondent only.

The brief background of the applicant's case is that the applicant is the holder of Bankers Acceptances avalised by the second respondent to the value of eight million nine hundred and twenty thousand six hundred and eleven United States dollars and seventy seven cents (US$8 920 611-77).

It was the applicant's uncontroverted position that at the time the application for summary judgment was filed the Bankers Acceptances which had matured and presented for payment by the applicant to the first respondent amounted to US$7 420 611-77 (seven million four hundred and twenty thousand, six hundred and eleven United States dollars and seventy seven cents hence the application for summary judgment had to be reduced to reflect this figure.

It is noteworthy, that during oral submissions by counsel the original Bankers Acceptances were availed to court. Both counsel and the court noted the authenticity of the Banks Acceptances. Photocopies of these documents are filed of record.

In opposing the application for summary judgment the first respondent through Munyaradzi J. R Dube raised basically two points *in limine* and proceeded to deny liability on merits in the manner elaborated herein below.

The first point *in limine* was a veiled attack on the absence of a resolution of the Board of Directors of the applicant authorising one Jayesh Shah upon whose founding affidavit the applicant's case is hinged, to represent the applicant.

The second preliminary point raised was that the applicant, being a foreign litigant had not provided any security for costs.

It was argued that this application must be dismissed on either or both of the preliminary points raised.

It is important to note that after the first respondent had filed a notice of opposition to the application for summary judgment desired by the applicant, the applicant proceeded to file an answering affidavit on 14 June 2012.

At the hearing of this application Advocate *Girach* sought to seek the leave of the court to ratify the inclusion of the answering affidavit in these proceedings a position which was strongly opposed by Advocate *Uriri*.

It is therefore imperative that I proceed to consider the two points raised *in limine* by the first respondent.

The need to provide security

I propose to deal with this issue first. It is true that the applicant is a peregrinus and therefore the need for such a litigant to have sufficient assets in this jurisdiction cannot escape the scrutiny of the court.

This preliminary point struck me as a mere smokescreen or a point rooted in air because of the following reasons.

If the first respondent genuinely believed that the applicant did not have sufficient assets in this jurisdiction to enable it to satisfy any adverse order of costs the first respondent ought to have taken this issue up with either the Registrar of this court or the court itself to ensure that this matter was not heard before the issue of the security for costs was sufficiently

addressed. See the case of *Prionsias Michafu Gorman* v *Forestry Commission NO* per GOWORA J (as she then was).[1]

The view the court takes in this regard is that the first respondent's failure to insist on costs before hearing was indicative of its conviction on reflection that the applicant has sufficient assets within this jurisdiction to meet any order of costs that might be visited upon the applicant as a result of this case. The first respondent lost the argument on this point the moment it allowed this matter to be heard before resolving or addressing this issue.

The absence of a Resolution authorising the deponent to initiate the application

It is neater that a deponent who purports to represent a company must seek to be properly clothed by a resolution to support his actions. This is the general practice.

However, the view that I take is that where a deponent specifically avers that he is the director of a company and asserts that he is duly authorised to act for and on behalf of that company and further that he can swear positively to the facts in issue but in the process inadvertently omits to attach a company resolution to that effect, it is unfair to disregard or blindly dismiss the deponent's position unless one can swear positively that the deponent lacks *locus standi* to represent the company concerned. Such an attack on the authority of the deponent must not be allowed to be a subject of speculation but must be properly anchored.

In the instant application, I did not hear the first respondent to seriously dispute the authority of the deponent and I prefer to accept the deponent for what he says he stands for.

Consequently the two preliminary points must be decided in favour of the applicant.

On Merits

During submissions Advocate *Uriri* strongly argued to my conviction that the answering affidavit which Advocate *Girach* sought to justify in terms of Order 10 r 67(c) had in fact been improperly smuggled into these proceedings.

The arguments against the admission of the answering affidavit were quite forceful and indeed persuasive and I ruled that such affidavit be expunged from the record hence no reference to it will be made in this judgment.

One of the reasons why the first respondent sought to challenge the applicant's claim was the disparity between the amount claimed in the summons (US$8 920 611-77) and the amount reflected in the application for summary judgment which was put at US$7 420 611-11.

[1] HH 107/06

A perusal of the Bankers Acceptances in issue clearly show that at the time the application for summary judgment was made the amount of those Bankers Acceptances which had matured amounted to the amount claimed in the summary judgment application. It is clear that from the figure claimed in the summons was subtracted the US$1 500 000 which was due to mature on 21 May 2012.

The first respondent was never going to be prejudiced by the reduced claim in the application for summary judgment and therefore there was no merit at all in the denial of liability in this regard.

The second point raised in denying liability by the first respondent was that the second respondent sold or ceded the Bankers Acceptances to the applicant without first respondent's knowledge or consent.

This argument does not take the first respondent's case any further if regard is had to para 4 of the credit facility of 26 August 2011 which outlined the drawdown procedures.

The letter of facility did not require the consent or approval of the second respondent before the Bankers Acceptances could be traded with a third party like the applicant. This becomes clearer if regard is had to para 4, 4.1.3 of the Credit facility which was couched as follows:-

> "After accepting your bills we shall offer them at a discount at the rate quoted by the local discount market at the time of discount…." .

The position adopted by the first respondent is further weakened by the nature of the Bankers Acceptances which gave their life spun and an indication that all of them were payable "to the Order of ourselves."

In terms of s 6 of the Act there is need for certainty as regards the payee. In this regard the relevant section reads as follows:

> **"<u>Certainty required as to payee</u>**
>
> (1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty".

The implication as I understand it from this provision of the law is that if the first respondent desired to have been consulted first by Interfin before it traded the Bankers Acceptances then those Bankers Acceptances should not have been made payable to bearer.

See all the Bankers Acceptances attached to the application.

By its para 9.2 to its opposition the first respondent fails to appreciate that the applicant's claim is in terms of the Bankers Acceptances which have matured on dates of

maturity as endorsed on the Bankers Acceptances themselves. Those endorsed dates have nothing to do with the 31st of July 2012.

In any event the position adopted by the first respondent would run foul to s 54(1) of the Act[2] which states as follows:-

> "54 **Liability of drawer or endorser**
>
> (1) The drawer of a bill, by drawing it –
>
> (a) Engages that on due presentation it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it….".

It was further argued by the first respondent through Advocate *Uriri* that there was no demand made for the payment of the Bankers Acceptances by the applicant.

One cannot help but accept the argument by Advocate *Girach* that the first respondent is not being candid with the court. Perhaps one would need to look at this averment by having regard to the letter of 07 March 2012[3] which reads as follows:-

> "Dear Sir
>
> **RE: AMOUNTS OWED TO INTERFIN BANK**
>
> Please be advised that you remain indebted to Interfin Bank in respect of the amounts you borrowed from us, under Bankers Acceptances. We inform you that we had sold these BA's to Al Shams Global BVI LTD, 'on a buy back basis' to raise liquidity.
>
> AL Shams are now demanding immediate payments of the amounts owed under these Bas and they will be contracting you for settlements. The details of the BAs held by Al Shams Global BVI Ltd are as follows……"

It is inconceivable in my view that in the light of the above referred letter, the applicant would have failed to demand payment from the first respondent.

In any event the summons commencing action by the applicant clearly states that;

> "8 the Bankers Acceptances have since matured and been presented for payment by the plaintiff to the defendants on diverse occasions but the defendants have failed and/ or refused to honour or discharge the Bankers Acceptances" [4].

The defence to an application for summary judgment entails the respondent sets up facts which if established would provide a plausible and *bona fide* defence. See the case of *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd and Anor* HH 64-10.

It is difficult to comprehend the first defendant's possible defence to the applicant's

[2] Bills of Exchange Act Chapter 14:12
[3] Page 44 of record
[4] Page 25 of record

claim.

I am more than satisfied that the first defendant has no *bona fide* defence to the applicant's clear claim. Appearance to defend has clearly been entered to obstruct quick finalization of this case

Summary judgment is accordingly granted in terms of the draft.

Dube, Manikai & Hwacha, applicant's legal practitioners
Danziger & Partners, 1st respondent's legal practitioners