CBZ BANK LTD
versus
FERNTAN ENTERPRISES (PRIVATE) LIMITED
and
VEZINTOKOZO NKOMO
and
HANDSOME GEZA
and
MAQOWETA NKOMO

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 16 September 2014 and 29 October 2014

Opposed Application

M. Mavhiringidze, for the applicant
S.M. Chisoko, for the respondents

MWAYERA J: The applicant and the first respondent had a business relationship of banker and customer respectively. In February 2011 the applicant and the respondent(s) entered into a contractual agreement whereby the applicant agreed to provide the respondents with an overdraft facility. The facility was availed with the respondents undertaking an obligation to repay the overdraft together with interest. The agreement terms were reduced to writing and the applicant and the respondent signed same. The second and third respondents bound themselves in writing as sureties and co-principal debtor to the applicant for the amounts due to the applicant by the first respondent. The respondents did not fully discharge their obligation culminating in the legal proceedings. The applicant issued summons claiming the unpaid credit as at 12 October 2012 being $134 922-00, the unpaid interest $49 469-10 and unpaid charges $5 584-74, Total claim $190 245-84.

The respondents entered an appearance to defend the claim and this prompted the applicant to file an application for summary judgement on basis that the respondents had no defence to the claim and that they were simply clutching on straw to delay the finalization of the

matter. The applicant instituted proceeding in terms of order 10 r 64 which paves way for application for summary judgment. Clearly summary judgment is a drastic way for finalisation of a matter but its usefulness where there is lack of genuiness on the part of the respondent should not be under played. Where the respondent has no defence to the claim but simply raises issues to delay the finalization of the matter it is justifiable to grant summary judgement.

The respondent opposed the application. Two points *in liminie* were raised in respect of the applicant's founding affidavit. The respondent argued that the date as reflected on the date stamp by the commissioner of oaths differed from the date endorsed in ink on signing and as such the affidavit was not properly authenticated. The argument was made that if there was no affidavit before the court then there was no application before the court since an application stands or falls on the founding affidavit. Clearly the deponent signed the affidavit in ink and so did the commissioner of oaths.

The commissioner of oaths endorsed the date in ink and this clearly ought to have been at the time of signing. The date stamp would come in after the taking of oath and signing. The fact that the stamp date was not properly changed to align with the long hand or pen date cannot vitiate the authenticity of the oath. The human era of not changing the date stamp is a clear mistake which does not invalidate the founding affidavit by the applicant. It is on that basis that the first point in *liminie* is dismissed. The case of *Surtee* v *Evans* and others HC 1590/10 is instructive. The Honourable Judge therein held that an unintended error by the commissioner could not affect the validity of the affidavits. In that case the name of the commissioner was not on the stamp. *In casu* the applicant on realising the mistake on date stamp sought to file a supporting affidavit to explain the anomaly. Such filing was un-procedurally done as it was not effected with the leave of the court. The applicant in so doing was flouting the rules of the court and one cannot help but agree with the respondent Counsel that, the supporting affidavit be expunged from the record. However, the complexion of the matter does not change given that the authority of the commissioner of the affidavit has not been nullified by the mere difference on date as endorsed by the commissioner of oaths and that on the date stamp. The other point raised in oral submissions is pertaining to there being no resolution filed to support the deponent as being authorised to appear and depose to an affidavit on behalf of the applicant.

Again the point *in liminie* cannot stand. I must hasten at this stage to mention that the deponent to the founding affidavit Mr Tsvangirai Thomas Gambiza has authority to give evidence. In the affidavit he is giving evidence in his capacity as Head of Collection and recoveries unit for the applicant. The deponent Mr Gambiza is therefore giving evidence as a professional attached to the collections unit of the applicant. Further in that position the deponent is well versed in the facility status. He is well placed in the category of giving positive evidence of what he knows and as such his evidence is in compliance with the rules of this court. It is therefore clear the deponent is well within his rights to give evidence. Turning now to the merits it is common cause that funds were availed by the applicant and accessed by the respondents. It is also not denied that an agreement which on the face of it outlines terms and conditions of the facility was duly signed by both sides. The respondents' argument that the applicant has no case because no cause of action accrued is not only inconsistent but contemptuous given the terms of agreement they accepted. The circumstances of the case, that an overdraft facility was advanced and the respondent accessed the facility is a clear indication that there is a cause of action given the money has not been paid back and it was in black and white that interest would accrue.

The respondent sought to argue that interest was unilaterally increased yet the agreement speaks for itself. Liability is not disputed and there is no triable issue emanating there from. The respondents' affidavit by Mr Handsome Geza is devoid of any defence to the capital advances and obvious bank charges and interest. The amount claimed is not in excess of double the capital advanced and as such not in violation of the *induplum* rule. There are just bald allegations of capitalization of interest which for its lack of substance is just viewed as a ploy to harass and further delay in paying the applicant what is rightfully and legally due to them. The bank is in business and naturally money cannot be advanced for free but with interest so as to enable continuity and circulation to other customers. It is apparent from the respondent's papers filed that no slight attempt is made to address the crux of the matter which is whether or not they paid back the capital amount. The papers do not reveal any material disputes of facts which would militate against disposal of the matter on paper.

Summary judgment procedure is available to cure the anomaly of delay in finalisation of matters where the defendant simply has no defence but opposes a matter showing *mala fide* intentions. Herbstein and Van Winsen, in their book *The civil procedure of the High Court of*

South Africa 5th ed Vol I Juta as Co 2009, stated that the procedure of summary judgement enables dispensation of a defence lacking in substance without otherwise inevitable delay in obtaining judgement and without putting the plaintiff through unnecessary expenses of trial. These sound sentiments find support in many cases. In the case of *Beresford Land Plan Private Limited Vurdutart* 1975 (1) ZLR at 260 it was held that the procedure is designed to meet numerous cases in which legal process in civil cases may be abused by unscrupulous litigants to delay enforcement of just claims.

The Beresford case *supra* cited with approval *Chrisma Pvt Ltd* v *Stuchburg and Andre* 1973(4) SA 123, it came out the procedure is clearly intended to deny *mala fide* defendants who just raise a bare denial of what they have full knowledge of owing to the detriment of the plaintiff.

Shingadia v *Shingadia*1966 (3) SA is also instructive wherein frivolous appearance to defend should be visited by granting of summary judgment for the obvious reason that the defendant clearly has no arguable defence. In *casu* the plaintiff has shown in the founding affidavit and attached facility offer document which both parties signed in agreement and accepted, that the respondents owe.

The respondent has simply defended the matter and sought to rely on technicality of an era on date stamp and interest issues without substantiation. There is no mention of how the capital amount advanced and bank charged is disputed. It is this capital amount advanced which forms the crux of the matter and no defence has been proffered. The applicant has met the requirements of r 64 and shown that the defendant has no *bona fide* defence and that the matter has no contentious issues and material disputes which cannot be resolved through the application procedure. It is now for the respondent to show a *prima facie* defence which is genuine.

For this proposition I seek guidance in the case of *Abercal Limited t/a refrigeration* v *Gore* HH 240-93. Wherein it was stated that "On his part the respondent in order to ward off the threat of summary judgement against him he must show that he has a *prima facie* defence''. He must state in his affidavit facts which if proved at trial will constitute an answer to the applicant's claim and must be *bona fide* meaning that the defence must be valid in law and not inherently unconvincing.

In *casu* the defendant has not disclosed the material facts upon which its defence is based. There has been a sketchy attack on technicality for example that date stamp on founding affidavit reflects a different date and that the deponent to the founding affidavit has no authority to represent the Bank. The respondent is faced with a clear claim for which no substantial defence has been raised. In other words there is nothing pleaded before the court by the respondent to show that the respondent has more than just a vague, bald and ingenuine defence. The respondent has not addressed the real issue of having signed a facility offer and acceptance letter which occasioned receipt of an overdraft on the part of the respondent. The respondent registered a Mortgage Bond over property and offered title deeds as security for the funds received. The facility document clearly spells out how interest issues were to be dealt with. This was agreed by the applicant and the respondent. There has not been shown a *bona fide* defense militating against the relief sought by the applicant. The *induplum* schedule attached does not reveal that the applicant is claiming more than double what was advanced to the respondent.

In the absence of proof of payment of what was advanced by the applicant to the respondent of which liability is accepted by the agreement entered, the applicant cannot be further inconvenienced by allowing the matter to proceed to trial given the superficial defence raised by *mala fide* intention to prolong the day of reckoning. The applicant has on a balance of probabilities laid bare that the respondent has no *bona fide* defence to the claim but has simply entered an appearance to defend to harass and frustrate the applicant.

The parties agreed in the offer and accepted facility document on the issue of costs. Given the unsubstantiated, and frivolous defence raised, I find no reason why I should award costs on a different scale from that agreed by the parties.

Accordingly it is ordered that:

1. Summary judgment be and is hereby granted.
2. The respondents are ordered to pay $190 245-84 jointly and severally one paying the others being absolved.
3. Interest thereon at the rate of 38% per annum from 13 October 2012 to date of final Payment.

4. That half share of SIDE of GOWELO Small Holdings (the mortgaged property) held under Deed of Transfer No. 383/2009 is executable at the first instance to satisfy judgment.
5. Collection commission calculated in accordance with By-Law 70 of the Law Society of Zimbabwe By-Laws, 1982 and costs of suit on a legal practitioner and client scale to the extent that such costs are permitted *in proviso* (iii) to By – Law 70(2)

Madanhi, Mugadza and Company Attorneys, applicant's legal practitioners
Tamuka Moyo Attorneys, respondent's legal practitioners