ALSHAMS GLOBAL LIMITED
versus
INTERFIN BANK LIMITED
and
SAVANNAHTOBACCO (PRIVATE)LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 28 June 2013 and 28 January 2015

Opposed Application

F Giach and L Uriri, for the applicant
ABC Chinake, for the 1st respondent
No appearance for the 2nd respondent

MAKONI J: The applicant (Alshams) instituted action proceedings against the respondents jointly and severally the one paying the other to be absolved for the payment of US$ 2 789 137-02. The second respondent (Interfin) did not enter appearance to defend. Alshams sought and obtained default judgment against the Interfin.

Savannah, the first respondent entered appearance to defend. Alshams then instituted the present application for summary judgment proceedings.

The background to the matter is that Alshams is the holder of Bankers Acceptances (BAs) avalised by Interfin to the value of $26 000 000-00. It has sufficient assets in the jurisdiction of this court to be able to satisfy any adverse order of costs.

Sometime in 2011 and in 2012 Savannah accessed certain facilities from Interfin secured by BAS issued by Savanna and drawn on, avalised and accepted by Interfin to the value of US$2 789 137-02. Interfin sold the Bas to Alshams, on a buy back basis. On maturity Alshams presented the BAs for payment by Savannah who failed and or refused to honour or discharge the BAs. Alshams then instituted action proceedings referred to above.

In its founding affidavit, Alshams verily the cause of action and aver that notwithstanding the notice of appearance to defend, Savannah has no *bona fide* defence to the

claim and the notice was entered solely for purposes of delaying the action. It further avers that by letter dated 7 March 2012, Savannah was advised by Interfin that it had sold the BAs to the applicant on a buy back basis and that the amounts had become due and payable to Alshams directly by Savannah.

In its opposing affidavit, Savannah avers that it accessed a loan through Interfin from Afrexim Bank. As a condition of the loan the BAs in issue were issued by it and were in support of the loan facility by Afrexim Bank. It averred that it was unaware of any transfer or negotiation of the BAs to Alshams and that the transfer was unlawful, fraudulent and in breach of the Banker/client relationship between Savannah and Interfin. It only became aware of the alleged arrangement between Alshams and Interfin on 7 March 2012 when it received a letter to that effect.

It further averred that it had discharged its obligations to Interfin outside of the Afrexim facility which were secured by the Bas. In the alternative it averred that the BAs relied on by Alshams have expired and are invalid.

In the further alternative. It avers that in the event that Judgment is entered against Savannah, then this court must order Interfin to indemnity Savannah dollar for dollar for the loss that it will suffer as a result of the fraudulent conduct by Interfin together with all legal costs.

Alshams filed an answering affidavit where it averred that it had no knowledge of the dealings between Savannah and Afrexim Bank. It denied that Interfin had no authority to negotiate or trade the BAs in its favour. It further denied that Savannah had no knowledge of the negotiation of the BAs to Alshams. It referred to the letter of 7 March 2012. It denied that the negotiation of the BAs was unlawful and fraudulent. It further averred that the Savannah does not deny receiving net proceeds against the BAs in issue.

Alshams in its Heads of Argument, gave notice that it will apply in terms of Order 10 r 67 (c) for leave to have the answering affidavit filed of record in this matter to be included as part of the record. Savannah, in their heads of argument took, *in limine*, the point that Alshams had failed to comply with the provisions of Order 10 r 67 in that the rule precludes an automatic right to file an answering affidavit in summary judgment proceedings.

It appears Mr *Chinake*'s concern was that the answering affidavit was filed without prior permission of the court. SMITH J (as he then was) in *In Vogue (Pvt) Ltd* v *E L Blue* HH 82/93 at p 3 stated

"I d not think a replying affidavit should be, as it were, held in reserve and then produced at the hearing of the application. That would be most unfair to the respondent and the judge hearing the matter. I consider that any replying affidavit in an application for summary judgment should be filed as though it were an answering affidavit and then at the hearing of applicant should seek the court's permission in terms of part (c) of the proviso to r 67."

See also *Edgars Stores Ltd* v *Dolem Investments* (Pvt) Ltd HB 3/04.

I agree with the approach adopted by SMITH J. This will allow all the parties involved to have read the affidavit before hand and be able to formulate their positions and be ready to deal with the issue rather than wait for day of hearing. To do otherwise lead to the undesired postponement and unnecessary increase of costs in the matter.

At the hearing, Mr *Chinake* contended that Alshams was aware of the circumstances of the Interfin which was that the arrangement between it and Alshams was temporary as stated in the letter of 7 March 2012. The averments of fraud are not new. They could not have escaped Alshams. They should have dealt with all facts in the founding affidavit.

Mr *Girach* submitted that r 67 (c) was designed for situations such as the present case. The applicant was not aware of the allegations of fraud. The letter of 7 March 2012 does not suggest any fraud. There is nothing to suggest that Alshams ought to have known about the fraud. It was not in the public domain. There were no criminal allegations.

The relevant portion of r 67 provides:-

"**67. Limitations as to evidence at the hearing of applications**

No evidence may be adduced by the plaintiff otherwise than by affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence viva vorce 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 institute, the plaintiff was or should have been aware of the defence;
c) Permit the plaintiff to supplement his affidavit with a further affidavit dealing with either or both of the following-
   i) Any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or
   ii) The question whether, at the time that the application was instituted, the plaintiff was or should have been aware of the defence."

The parties are agreed on the import of r 67(c) which is that the court may permit the plaintiff to supplement his affidavit with a further affidavit in response to issues raised by the

defendant which the plaintiff could not reasonably be expected to have dealt with in his founding affidavit.

The issue therefore, is whether the matters raised by the plaintiff in the answering affidavit are in response to matters which the plaintiff was not aware of at the time it filed its answering affidavit. The only issue raised by Alshams in its submissions is the fraud allegations made by Savannah. This aspect is related to in para 7.2 of the answering affidavit. The rest of the affidavit which is 19 pages long, dealt with other issues not related to the fraud. Alshams was building and strengthening its case in the answering affidavit when the other party have no opportunity to respond to same. Such acts defects the whole purpose of having summary judgment proceedings. I will therefore allow the answering affidavit in so far as it responds to the issue of fraud and expunge the rest of the paragraphs from the record.

Summary judgment is a procedure designed to enable the plaintiff whose claim falls within certain defined categories to obtain judgment without the necessity of going to trial. The objective is to enable the plaintiff, with a clear case, to obtain swift enforcement of a claim against a defendant who has no real defence to the claim.

This position is now settled in on law. Case law has stressed the fact that the remedy provided by this rule is of an extraordinary and drastic nature which is very stringent in that it closes the door for the defendant. The basis of granting the claim is that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad or low. See *Herbstein &Van Winsen*, ed 4 p 34.

The defendant must establish a *prima facie* defence and must allege facts which if he can succeed in establishing them at trial would entitle him to succeed in his defence at trial. See *Rex* v *Rhodian Investments (Pvt) Ltd* 1957 R & N 723. *Kingstone Ltd* v *LD Ineson (Pvt) Ltd* 2006 (1) ZLR 451S.

See also *Hales* v *Doverick Investments (Pvt) Ltd* 1988 (2) ZLR 228 at 239 G-239 B where MALABA J (as he then was) stated

> "The defendant's affidavit should **not disclose the nature of the defence relied upon to** resist plaintiff's claim for ejectment, **but must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing.** In *Mbayiwa* v *Estern Highlands (Pvt) Ltd* S-139-86 at pp 4-5 of the cyclostyled judgment MANALLY JA referred to the degree of particularity and completeness which the facts averred by the defendant in its affidavit filed in opposition to an application for summary judgment must achieve as being that:
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> > 'while the defendant need not deal exhaustively with the facts and the evidence relied on to sustain 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).
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> ...the statements 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*** (*Breitebanch* v *Fiat SA (Edms)*BPK 1876 (2) SA 226 at 228 D-E)
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> ...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** (*district Bank Ltd* v *Hoosain & Ors* 1984 (4) SA 544 at 547 G-H)."

Mr *Girach* submitted that BAs were signed by Savannah as the drawer and Interfin as the acceptor. BAs were made in favour of Interfin as security. He further contended that BAs are by that nature negotiable. The consent of Savannah was not a prerequisite to the negotiation of the BAs. The contention that the negotiation of the BAs amounted to unlawful conduct is untenable.

Mr *Girach* further contended that the other issues raised by Savannah were seeking to create a ruse with vague unsubstantiated allegations in a desperate attempt to buy time. These are

(i) That the letter dated 7 March 2012 indicated that the BAs had been sold on a temporary basis.

(ii) That Interfin engaged in a fraud but do not provide particulars of how this came about.

(iii) That it paid off the loan to Interfin but does not advise the court as what payments were due and what payments were made and proof of the payment.

(iv) That Savannah retired BA No 1736 – 615913 -180 and yet it is not of one of the BAS applicant relies on for its claim.

Mr *Chinake* submitted that Savannah admits issuing the BAS and that they were to produce security for a facility with Afrexim Bank. Interfin was acting as an intermediate bank for the loan advanced to Savannah by Afrexim Bank. In negotiating the BAS, Interfin acted fraudulently. No wonder its statement in the letter of 7 March 2012 that the arrangement was temporary. He further submitted that an endorsement by Savannah for the negotiation of the BAs was necessary as the BAS were used as security for the benefit of Afrexim Bank facility.

Mr *Chinake* further contended that, in the alternative, the bills had expired at the time

that they were presented and s 44 (1) of the Bill of Exchange Act applies. He further contended that Alshams had claimed interest at the rate of 23 per cent in the summons and yet was claiming 25 per cent in the present proceedings. Alshams was also claiming collection commission and yet the BAs do not set out any such conditions. He further contended that Savannah had made payments to Interfin but is now being required to pay the entire face value of the BAs without reference to the payments it has made.

In reply Mr *Girach* contended that Savannah endorsed the BAs and there was no reference to Afrexim Bank. He further submitted that Alshams will claim interest at the rate of 23 per cent as mentioned in the summons and that it abandons the claim for collection commission.

He further submitted that the bills were presented on matirity and were not honoured. Savannah did not deny the averment in para 10 of the founding affidavit. No evidence of fraud was submitted by Savannah.

Both parties are agreed that the BAS are bills of exchange within the meaning of the expression as used in the Bills of Exchange Act [*Chapter 14:02*] (the Act). Section 3 (1) of the Act defines a bill of exchange as follows:

(i) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of a specified person or to bearer. Black's *Law Dictionary*, ed 5 at p 133 defines a BA as

> "Bankers acceptances are short-term credit instruments most commonly used by persons or firms engaged in international trade. They are comparable to short-term securities (for example, treasury bills) and sold on the open market at a discount."

KUDYA J in *Standard Chartered Bank* v *Zimra* 2007 (1) 228 (H) at 213 E stated the following in relation to treasury bills.

> "THE NATURE OF TREASURY BILS
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> These are freely negotiable financial instruments which fall into the same class as promissory note, bankers acceptances and bills of exchange. They are freely negotiable before debt instruments which are sold at a discount on that face value. They are used to finance commercial operations from their sale at a discount and payment is made at that face value on maturity. They may, of course further be sold for less than their face value by any holder before maturity (my own underlining)

From the above it is clear that Bas are, by their name freely negotiable. Savannah endorsed the BAS at the back and in the endorsement there is no reference to Afrexim Bank. It was an open endorsement suggesting that Interfin would ded in the BAs in relation to any other party and not Afrexim bank. As was stated in the *Standard Chartered Bank* (*supra*) the BAs may be sold for less than their face value by any holder before maturity. Interfin was the holder of the Bas and could freely negotiate them. The consent of Savannah was therefore not a pre requisite to the negotiation of the BAs. The contention that the negotiation of the BAS by Interfin amounted to unlawful and fraudulent conduct cannot be sustained. Seeking such consent would defeat the whole idea underlying the issuance of BA which is to raise funds on the open market. In any event, if Savannah had issues with the way Interfin had handled the BAs one would have expected it to protest to both Interfin at Alshams at the earliest available opportunity, which was 7 March 2012. Its silence is consistent with the fact that it knew and appreciated the exact nature of the instrument it had signed.

My view is that this is the determining factor. All the other issues being raised by Savannah are as rightly pointed by Mr *Girach*, a ruse in an attempt to deny Alshams to obtain a swift enforcement of its claim.

Savannah has not laid a basis for stating that it has paid off the loan to Interfin. In any event Alsham's claim is based on the BAs and not the facility that Savannah had with Interfin. The BAS that Savannah claim to have retired are not the BAS that Alshams's claim is based on.

It is my finding that Alshams's claim is unimpeachable and that the Savannah has failed to establish a *prima facie* defence and facts which if it can succeed in establishing them it will entitle it to succeed in his defence at the trial.

Accordingly I will make the following order:

IT IS ORDERED THAT:

1. Summary Judgment be and is hereby granted.
2. The first respondent, be and is hereby ordered to pay:-
    a. The sum of US$ 2 789 137-02 (Two million seven hundred and eighty nine thousand one hundred and thirty seven United States Dollars and two cents being the face value of the Banker's Acceptances issued by first respondent
    b. Interest thereon at the rate of 25 per cent per annum, capitalised from the maturity

date of each and every one of the banker's Acceptances, to date of final payment.

c. Collection commission in relation to the aforesaid claim in accordance with By-law 70 (2) of the Law Society of Zimbabwe By-laws, 1982

3. The first respondents liability is joint and several with that of the second respondent and the first respondent may only be absolved upon payment of the outstanding amount in full by the second respondent.

Dube, Manikai & Hwacha, applicant's legal practitioners
Kantor & Immerman, 1st respondent's legal practitioners