

IDEAS KUNAKA
versus
KAYS STORES
and
MICHAEL MBOFANA
and
VIOLET MBOFANA

IN THE HIGH COURT OF ZIMBABWE
MATANDA-MOYOJ
HARARE, 20 July 2015 and 5 August 2015

Opposed matter

J Mutoono, for the plaintiff
D Mukwashari, for the defendants

MATANDA-MOYOJ: On 20 January 2015 I gave the following relief in favour of the plaintiff as against the first defendant only;

That summary judgment be and is hereby entered as against the first defendant on the following;

- 1) That 1st defendant pays the plaintiff the sum of \$55 000.00, being monies advanced to first defendant at its instance.
- 2) That 1st defendant pays interest at the prescribed rate from 1 November 2014 to date of full payment.
- 3) That 1st defendant pays collection commission as set out by the Law Society of Zimbabwe.
- 4) That 1st defendant pays costs of suit on a higher scale.
- 5) Should 1st defendant fail to settle the above amount, its immovable property called stand 394 Willowvale Township of Willowvale held under Deed of Transfer No. 13894/2002 be and is hereby declared specially executable.

I have been requested to provide reasons for my decision. These are they;

The plaintiff issued summons against the defendants jointly and severally for payment of \$55 000.00. The claim was based on an acknowledgement of debt signed by the defendants. The first defendant borrowed \$55 000 from the plaintiff and such debt was secured by registration of a mortgage bond over the first defendant's property above; Mortgage Number 2602/14 refers. The defendants undertook to pay 100% collection commission in the event of a default. The defendants failed to pay resulting in the plaintiff issuing these summons. The plaintiff on p 14 of the record provided the acknowledgement of receipt of funds signed by the second defendant on behalf of the first defendant. The first defendant acknowledged receiving the sum of \$55 000.00 from the plaintiff. On p 15 of the record again the first defendant acknowledged being indebted to the plaintiff in the sum of \$55 000.00 and undertook to pay collection commission and legal costs on a higher scale should the matter proceed to court.

The defendants entered appearance to defend. The plaintiff responded by filing this application for summary judgment. Two criterias ought to be met before summary judgment can be granted; there must be no genuine issues of material fact and secondly the applicant must be entitled to judgment as a matter of law. A part opposing summary judgment must introduce evidence that contradicts the applicant's version of facts. The facts in dispute must be pivotal to the case; irrelevant on minor factual disputes will not defeat the granting of summary judgment. There should be no triable issues of fact for summary judgment to be granted.

The facts in the present case are common cause. There is documentary evidence supporting the plaintiff's case. The defendants do not deny they signed the acknowledgment of receipt of the money and the acknowledgement of debt. However the defendants argued that they have plausible defence in the main action. The defendants averred that the plaintiff acted as a money lender and ought to be bound by the Money Lending and Rates of Interest Act [*Chapter 14:14*]. They argued that they intended to show that the plaintiff was breaching the law by carrying out the business of money lending without registration. The defendants implored the court to refuse to exercise its jurisdiction until the plaintiff complied with the law. The defendants also submitted that they do have a defence that they were never advanced \$55 000.00. They received \$15 000 and \$20 000.00- a total of \$35 000.00. The other \$20 000.00 represented illegal interest.

I am of the opinion that without proof of the actual borrowings the defendants have failed

to show that they have a plausible defence to the claim. The papers before the court are quite clear that the first defendant borrowed \$55 000.00 and even registered a bond for that amount over its property.

In order to succeed in defeating a summary judgment application, the respondent must disclose a defence and material facts upon which that defence is based with sufficient clarity and completeness so as to persuade the court that if proved at trial such facts will constitute a defence to the claim: See *Kingstons Ltd v L.D. Ineson (Pvt) Ltd* 2006 (1) ZLR (S), *Jena v Nechipare* 1986 (1) ZLR 29 (S), *Mubayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139/86.

The respondents must not provide needlessly bold, vague or sketchy defences as that would only point to *malafides* in defence. Robinson J in *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 37 warned that parties to a contract must not cry foul when they are taken to court when they fail to honour part of their contract.

I am shocked that the defendants would behave as law abiding citizens, calling upon this court to refuse to entertain the matter on the basis that the plaintiff was not a registered lender. If this was true then the defendants would not have approached the plaintiff in order to perpetuate his illegalities. I am of the view that the defendants are only trying to evade payment when the time of reckoning has approached. The courts should protect themselves from such abuse by persons who enter into contracts, then try to wiggle out when the time for payment has arrived.

The defendants are not denying that they agreed to the terms of the contract. They only seek to impeach the agreement on the basis that interest charged was exorbitant. That, as I have said above represents bold assertion without proof. The documents show that \$55 000.00 was advanced to the defendants. The first defendant has not satisfied me that he has a good *prima facie* defence to applicant's claim. See *Shingadia v Shingadia* 1966 RLR 285, *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 (4) SA 631.

I am satisfied that the plaintiff has a clear indefensible claim as against the first defendant. The other two defendants are merely directors of the first defendant. The plaintiff has not shown any basis for claiming from them in their personal capacities. The claim as against the second and third defendants is not assailable, and the two defendants have availed a *bona fide* defence that they were only acting for the first defendant. I am of the view that the claim as against the second and third defendants should be allowed to proceed to trial.

The plaintiff rightly conceded that commission should be charged at the prevailing Law Society rates. As such there is no need to refer such issue to trial as it is admitted.

The property in question was mortgaged to secure the \$55 000 debt which the first respondent has failed to pay. The first defendant has no defence why such property should not be declared executable.

Accordingly summary judgment be and is hereby entered against the first defendant as per my order of 20 July 2015.

Chadyiwa & Associates, applicant's legal practitioners
Kantor and Immerman, defendant's legal practitioners
T.C.Chitapi & Associates, defendant's legal practitioners