

ECOBANK ZIMBABWE LIMITED  
versus  
PUZEY AND PAYNE (PRIVATE) LIMITED  
and  
CHARLES NHAMO NYAMBUYA  
and  
ELTON MTISI  
and  
HEBERT SAMBO  
and  
STERNLY KANDONGWE  
and  
IDAH NYAMBUYA

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 20 March 2018 and 28 March 2018

### **Opposed Matter – Summary Judgement**

*K. Kanyemba*, for the applicant  
*S. Mpofu*, for the 5<sup>th</sup> respondent

MAKONI J: This is an application for summary judgment whereby the applicant is seeking the payment of certain sums of money from the first respondent only.

The background of the matter is that the applicant and the first respondent entered into a Facility agreement in terms of which the applicant would loan and advance money to the first respondent to purchase buses, motor vehicles, spares and parts to fulfil confirmed orders and, the first respondent would repay the loan from the sale proceeds of the purchased vehicles and goods. The second, third, fourth, fifth and sixth respondents bound themselves jointly and severally as sureties and co-principal debtors with the first defendant. However, the first respondent failed to make full repayment for the debt which rose to US\$282 528,76. The applicant issued summons for the payment of US\$282 528.76 against the respondents. The applicant and the respondents then

entered into a scheme of arrangement which was registered as an order of this court on 12 July 2017 and registered with the Registrar of Companies.

The fifth respondent opposed the application on the basis that the applicant was part of a scheme of arrangement in terms of which all the claims against the first respondent were stayed. The fifth respondent aver that the applicant cannot proceed against the fifth respondent to enforce payment against a guarantor where it has agreed to other payment terms with the first respondent to whom the money was advanced.

Summary judgment procedure is a procedure designed to enable a 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 that claim.

A number of cases in our jurisdiction and in South Africa have 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 for granting the claim is that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad at law. See Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> ed p.517.

The court must guard against an injustice of expecting the defendant to satisfy the court that he has a *bona fide* defence without the benefit of further particulars, discovery or examination.

The defendant must only 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 the trial. See *Rex v Rhodesian Investment Private Limited* 1957 RN 723.

The question is whether the respondent has shown some good defence to plaintiff's claim.

The fifth respondent's defence is that its exposure is antecedent to Puzey and Payne's indebtedness. Puzey and Payne has not failed to pay in terms of the new arrangement which is the scheme of arrangement.

I want to agree with the position of the fifth respondent. The fifth respondent's liability is joint and several to Puzey and Payne. If a claim cannot be made against Puzey and Payne then it cannot be made against him. One might want to observe that, the applicant, for reasons which are not clear, does not make reference, at all, to the scheme of arrangement in its founding affidavit.

There is therefore no averment that the first respondent has failed to pay in terms of the new arrangement.

In my view, the defendant has established a *prima facie* defence and has alleged facts which might entitle him to succeed in his defence at trial.

In the result, I will make the following order:

- 1) The application is dismissed.
- 2) The applicant to pay then respondents costs.

*Chitewe Law Practice*, applicant's legal practitioners

*Mandizha and Company*, 1<sup>st</sup> and 3<sup>rd</sup> respondent's legal practitioners

*Coghlan Welsh and Guest*, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondent's legal practitioners

*Munangati and Associates*, 5<sup>th</sup> respondent's legal practitioners