

AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
versus
SHEPHERD NASHE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 29 November & 13 December 2017

Opposed Application- Summary Judgment

Ms *T Mukwasha*, for the applicant
T Deme, for the respondent

CHAREWA J: Applicant issued summons against the defendant claiming \$91 592.03 arising out of money lent and advanced to the defendant, 17% interest thereon in terms of the loan agreement, a declaration that stand 3051 Bluff Hill Township of Lot 13 of Bluff Hill measuring 2 9644 hectares is especially executable, collection commission and costs of suit on the legal practitioner and client scale.

Respondent entered appearance to defend whereupon applicant filed the present summary judgment application on the grounds that respondent, having not denied the loan agreement, and having acknowledged his indebtedness on a liquid claim, had no good and *bona fide* defence but had entered appearance merely for purposes of delay.

In opposing summary judgment, respondent submitted *in limine*, that this application rests on a vacuum as it was withdrawn, in that, a notice of withdrawal of the main matter with case reference HC 9932/16 was filed on 23 March 2017. He argued that though the body of the notice purported to withdraw a previous summary judgment application in HC10772/16, the fact that notice of withdrawal carries the case number for the main matter HC 9932/16 effectively meant that HC10772/16 was not withdrawn, but the main matter was.

Alternatively, he submitted that if it is accepted that the notice of withdrawal was for the summary judgment application in HC 10772/16, there was no tender of costs, thus making such purported withdrawal a nullity. Consequently the previous summary judgment application in HC 10772/16 remained extant, with the result that the current application is a nullity.

He further submitted that, applicant recognised that the original summary judgment application was still valid. As such, to try and correct the situation, applicant eventually filed a valid notice of withdrawal of the summary judgment application in HC 10772/16 on 31 July 2017. However, this was long after the institution of the current application, creating further procedural errors as applicant ought to have filed a fresh application for summary judgment as the current application was a nullity, having been filed while a previous application was still extant.

On the merits, respondent submits that he has paid \$43 000 towards the debt, which amount has not been taken into account in arriving at the amount outstanding of \$91 592.03. In addition, he disputes the interest rate of 17% per annum as well the acknowledgment of debt he is alleged to have signed which he claims is a forgery. Finally he argues that since the loan period had not expired, applicant was not entitled to issue summons, let alone obtain summary judgment.

The Law

I will not reiterate the law regarding summary judgment applications as it is trite and has been well articulated by the parties in their heads of argument. Suffice it to say that I am only required to assess whether or not the points *in limine* as well as the facts averred on the merits are sufficient to meet the standard that, if proved at a trial, they would enable the respondent to succeed, or at the very least place before the court a *prima facie* defence.¹

Analysis

It is clear on the face of it that applicant filed a notice of withdrawal of the main matter that is HC 9932/16. Certainly, if respondent can prove that the main matter was withdrawn, there can be no basis for granting summary judgment *in casu*.

Alternatively, the notice of withdrawal, even had it been for the original summary judgment application in HC 10772/16, did not contain a tender for costs. *Ergo*, the notice of withdrawal is not valid. Therefore the summary judgment application in HC 10772/16 remains before the court. In addition, that applicant filed a valid notice of withdrawal of HC 10772/16 on 31 July 2017 does not help its cause, since this was long after the institution of the current application. It cannot be gainsaid that as at the time the current application was filed, there existed a pending application on the same matter making the institution of this application a nullity.

¹ See *Jena v Nechipote* 1986 (1) ZLR 29 (S)

On the merits, respondent has cast doubt on the veracity of the acknowledgment of debt partly relied upon by the applicant. Clearly, this document is of doubtful import. Ms *Mukwasha*, for the applicant, acknowledged that it is improperly executed, as it is not properly initialled or witnessed. And if applicant cannot rely on it, then the claim for interest at 17% per annum becomes questionable as this is provided for in clause 3 of that document. It seems to me therefore that in this respect too, the respondent has raised a plausible defence to summary judgment which, if proven will certainly affect his level of indebtedness.

Even though in his notice of opposition, the respondent drew to applicant's attention the fact that he paid more (\$43 000) than what is on the *in duplum* schedule (\$38 361.80), applicant did not address this at all in its heads of argument. If respondent is able to prove a payment of \$43 000, and this is added on to the reduction in interest aforesaid, then his indebtedness will be substantially reduced.

It seems to me therefore that, procedurally, applicant dug its own hole and fell into it. On the merits, respondent has raised facts, which if he is not allowed the opportunity to prove at a trial, may result in serious injustice, in that he will be made to pay more than what he ought.

In the premises, I cannot grant summary judgment in this matter.

Having declined to order summary judgment, I do not find it necessary to deal with applicant's application for costs on the punitive scale. This is more so given my finding that applicant is the author of its own procedural misfortune and carelessness in failing to ensure that the acknowledgment of debt is properly executed or that its pleadings have been properly drawn and filed..

Nor am I persuaded that this is a matter where I should grant attorney and client costs to the respondent. Clearly, he owes the applicant some money based on a loan agreement which he has defaulted in paying. It seems to me that respondent is also the author of his own misfortune as his default gave applicant reasonable cause to believe that it could apply for summary judgment.

Disposition

CONSEQUENTLY, IT IS ORDERED THAT

1. The application for summary judgment is dismissed.
2. The applicant be and is hereby ordered to pay the respondent's costs on the ordinary scale.

Dube-Banda and Nzarayapengai & Partners, applicant's legal practitioners
Thoughts Deme Attorneys at Law, respondent's legal practitioners