AFRICAN CENTURY LTD
versus
NIBLE INVESTMENTS (PRIVATE) LIMITED
t/a ROCKSAVE MINING
and
GARRY SIDNEY SMITH
and
MUTSA MUJAJI

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 21 November 2016, 31 January 2017 and 03 March 2017

Opposed application

B. Mataruka, for the applicant
J. Mutonono, for the respondents

CHIWESHE JP: This is an application for summary judgment in terms of Rule 64 of the High Court Rules, 1971 which provides as follows

> "(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pretrial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
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> (2) A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action.
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> (3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action.
>
> (4) ……………………………………………………………………"

The background facts to this application are as follows. On 7 January 2014 and 28 April 2015, the first respondent and the applicant entered into two lease agreements (lease

finance facilities). The material terms of the lease agreements were that the applicant was to avail funds for the purchase of various vehicles. These vehicles would then be leased to the first respondent. In turn, the first respondent was obliged to pay, with respect each vehicle, a deposit fee followed by instalments spread over a period of time. The first respondent procured the unlimited guarantees of the second and third respondents for the due performance of the lease agreements.

The first respondent defaulted on its obligations, accumulating arrears in the sum of $24 521.15. In terms of the lease agreements, the applicant was entitled to demand payment of the entire balance at any stage and in the event of default, the plaintiff had the right to cancel the lease agreements and claim rentals for the unexpired portion of each lease agreement.

The plaintiff then issued summons against the defendants claiming, against all the defendants, jointly and severally, payment in the sum of $112 663.61, the one paying the others to be involved, interest thereon and costs of suit on a legal practitioner and client scale. Further, as against the first respondent only, the applicant prays for an order that the four vehicles subject to lease be delivered to the plaintiff and declared executable.

The first and third respondents entered appearance to defend and proceeded to file their plea, wherein they denied being in arrears as claimed. The respondents aver that they had made payment in the sum of $21 000.00. This they did in November 2015. In the absence of arrears, so the respondents argue, the claim for potential rentals is not yet due. Being of the view that the respondents have no *bona fide* defence to its claim and that appearance to defend had been entered merely for purposes of delay, the applicant filed the present application for summary judgment.

At the hearing of this matter the parties indicated that they had reached an out of court settlement. I recorded the terms of that settlement in court and directed that the parties file by close of business on that date a draft consent order. The terms of the settlement as recorded in court were to the following effect. The first respondent was to return the motor vehicles to the applicant and, thereafter, but within three months, the first respondent would settle half the amount claimed after which the motor vehicles would then be returned to the first respondent on agreed terms.

Contrary to my directions the parties failed to file the relevant deed of settlement and the draft consent order. By letter dated 9 December 2016 the applicant advised the registrar

that the respondents were reluctant to sign the consent papers and were unlikely to do so at any stage. The applicant requested that the matter be set down for hearing.

On 31 January 2017 the parties attended court for the hearing. Mr *Mutonono,* for the respondents, informed the court that his clients declined to sign the draft consent order because the parties could not agree on the modalities of executing the terms of the settlement. The respondents were of the view that the four motor vehicles be sold by private treaty and not by auction. Further, that because the motor vehicles were being repossessed, the applicant should forgo its right to claim potential rentals.

Firstly, the manner in which the vehicles would be sold is not the subject of this application. The sole issue is whether or not the respondents are liable to pay the sums claimed by the applicant. Secondly, the applicant's right to claim potential rentals arises from the agreement signed by the parties. Paragraph 8 (b) of the lease agreement reads as follows:

> "8. **Termination**
>
> (b) In the event of termination in terms of clauses 8 (a) (ii) above, the Lessee shall, at his own expense, return the Goods to the Lessor at the place notified by the Lessor to the Lessee and the Lessor shall be entitled:
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> (i) to claim from the Lessee all amounts due from the Lessee under this Agreement, which had accrued as at the date of termination, and either
> (ii) to claim damages from the Lessee arising out of the termination of this agreement; or
> (iii) to claim the rentals for the unexpired portion of this agreement from the date of termination until the date this agreement would otherwise have expired in terms of the Schedule; and
>
> in either event to sell the goods as permitted by law and to offset the set sum received against the sum owed by the Lessee to the Lessor, as well as to claim any expenses incurred in the recovery, storage or sale of the Goods."

Mr *Mutonono* sought to introduce a new dimension to this matter. He raised the question whether interest had been properly calculated. The question of interest is provided for under the lease agreement. The applicant says it has calculated the rate of interest in accordance with para 1 (c) of the lease agreement. Mr *Mutonono* hopes that at some point in future an expert on interest would be engaged and that such expert would necessarily vindicate his clients' position that the interest was wrongly computed. Such to me appears to be mere speculation on the part of the respondent. In any event the question of interest is being raised in court for the first time. The respondent's opposing affidavit does not contain any averment on the question of interest. Mr *Mutonono* cannot therefore supplement the

respondent's evidence from the bar. In any event the summons in this case were filed on 23 November 2015. The respondents have had ample opportunity to analyse and be heard on the question of interest. Failure to have done so implies that the respondent has no basis to challenge the rate or even quantum of the interest charged.

In *Majoni v Minister of Local Government and National Housing* 2001 (1) ZLR 143 S the court stated thus:

> "The principles applicable in a summary judgment application have been well documented. The quintessence of this drastic remedy is that the plaintiff, whose belief it is that the defence is not *bona fide* and entered solely for dilatory purpose should be granted immediate relief without the expenses and delay of trial……"

I am satisfied that the applicant has a clear and unassailable case against the respondents. Its case is based on the clear and unequivocal provisions of a contract between it and the first respondent. A perusal of the books of accounts kept by the applicant shows that at the time summons was issued the first respondent was in arrears of its instalments. The respondent do not dispute this fact. That being the case the applicant put in motion the contractual consequences of that default. The claim by the first respondent that it had at some point cleared the arrears through a payment in the sum of $24 000.00 does not hold water. Firstly that payment is not reflected in the applicant's books of accounts. More importantly, the first respondent has no proof either by way of receipt or other evidence that such payment was indeed made. It is unlikely that payment of that magnitude would have gone unrecorded by either or both parties. I am satisfied that the first respondent has no *bona fide* defence in this regard.

In *Jena v Nechipote* 1986 (1) ZLR 29 (S) the Supreme Court set down the following threshold for a defendant to succeed against an application for summary judgment:

> "All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that "there is a mere possibility of his success", "he has a plausible case", "there is a triable issue" or there is a reasonable possibility that an injustice maybe done if summary judgment is granted."

The respondents in my view have not met that threshold. There is no *bona fide* defence to this application. On the contrary the respondents have all but admitted liability. I am satisfied that appearance to defend was entered merely for purposes of delay. The applicant is accordingly entitled to immediate relief. It should not be subjected to the

expense and delay of a trial. It was for these reasons that I granted the application in the following terms:

IT IS ORDERED AS FOLLOWS:

1. As against all the respondents jointly and severally the one paying the others to be absolved:

   1.1 Payment of the sum of US$112,663.61;
   1.2 Payment of interest thereon at the rate of 39% per annum calculated from the date of summons to the date of payment in full;
   1.3 Payment of costs of suit on a legal practitioner and client scale.

2. As against the first respondent only, an order that certain motor vehicles, namely Mercedes Benz GL320 CDI-2008 Registration Number ADF 8609, Chev Trailblazer 2.8 D 4x4 A/T Registration Number ADR 9233 and Range Rover Sport 3.0L Registration Number ADV 5831 be delivered to the applicant and be declared executable.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Chadyiwa & Associates, respondents' legal practitioners