

AGRICULTURAL BANK OF ZIMBABWE LIMITED  
versus  
NOTAYI MUTEMASANGO

HIGH COURT OF ZIMBABWE  
CHAREWA J  
HARARE, 17 November & 20 December 2017

### **Opposed Application- Summary Judgment**

*E Muringani*, for the applicant  
*Ms R Peters*, for respondent

CHAREWA J: Applicant issued summons against the defendant on 15 June 2016 claiming payment of \$35 576.17 arising out of money lent and advanced to and duly acknowledged by the defendant, interest thereon and bank charges that may accrue at the bank's prevailing rate from June 2016 and costs.

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

Respondent opposed summary judgment on the two grounds that:

- i. The interest claimed is excessive in the circumstances; and
- ii. The parties agreed to restructure the debt, and this agreement supersedes any previous agreement.

At the conclusion of the hearing I rendered an *ex-tempore* judgment wherein I granted applicant's request for summary judgment. The respondent having appealed against my decision, hereunder are my written reasons for judgment.

#### **Undisputed facts**

It is not disputed that respondent borrowed the sum of \$25 000 from applicant on 30 January 2013. Neither is it in dispute that as at the date of issuance of summons in June 2016, respondent had only paid \$5 000 towards the interest and capital on the debt, which payment

was made in November 2013. Nor is it in dispute that subsequent to the issuance of summons, respondent paid \$3 500 in October 2016.

Further, save for objecting to the interest rate as “excessive”, respondent has not put the *in duplum* schedule into contention or given any basis for disputing such schedule. No less than five letters of demand were sent to respondent, neither of which was met with a denial of liability. Rather, respondent took the opportunity to explain why he was failing to service his debt.

In fact, it is not even disputed that respondent acknowledged his indebtedness to applicant in the sum of \$35 247.90 nor is it in contention that he made an offer to restructure his debt by giving a debt management mandate to his financial advisers. What is in dispute is whether this offer to restructure the debt resulted in an agreement between the parties.

### ***The Law***

The law regarding summary judgment applications is trite. I will therefore not waste time reiterating it. All I am required to do is to assess whether, on the evidence before me, facts have been averred which, if proved at a trial, would enable the respondent to succeed, or at the very least place before the court a *prima facie* defence.<sup>1</sup> In that regard, it is worth noting that not every defence raised by a respondent will defeat summary judgment<sup>2</sup>

### ***Analysis***

Firstly, respondent argued that the interest charged is excessive. However, he placed absolutely no evidence or facts before the court that would indicate that the interest charged on the loan he took was excessive. It is not averred, in the opposing affidavit, that the interest rate is usurious or has breached the *in duplum* level, or even that it is unfair and unjust or has breached any statute.

In fact, it is not disputed that the interest is predicated on the bank lending rate. It is further not averred that the bank lending rate for the applicant is not within the limits prescribed by the Reserve Bank of Zimbabwe or is in contravention of the Banking Act [*Chapter 24:20*]. Therefore, the respondent’s averment that the interest rate is excessive and offends against the Contractual Penalties Act [*Chapter 8:04*] and the Consumer Contracts Act [*Chapter 8:03*] has

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<sup>1</sup> See *Jena v Nechipote* 1986 (1) ZLR 29 (S)

<sup>2</sup> *Kingstons Limited v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451(S)

absolutely no factual foundation which would enable me to assess whether that factual foundation, if proved, would enable respondent to succeed.

I therefore find that this defence to summary judgment is not *bona fide*, but is spurious and of no consequence, particularly since, as I have already noted, the *in duplum* schedule has not been put in issue, and from 2013, respondent never disputed the interest he was being charged on the loan.<sup>3</sup>

Perhaps my finding would have been different if the defendant's opposition to summary judgment had been predicated on the nature of the claim for interest, in that the draft order seeks an indeterminate rate of interest. However, I am not convinced that even had this been raised as a defence to summary judgment I would have found it to be a plausible defence which could defeat a summary judgment application for the reason that interest at the prevailing bank rate is neither vague nor uncertain as it is easily ascertainable at any given moment.

Secondly, the respondent submits that summary judgment should not be granted as the debt has been restructured and a new super ceding agreement has been entered into by the parties. Unfortunately, respondent has not taken the court into his confidence: no such agreement has been attached to his opposing affidavit, nor has he disclosed any facts that would lead the court to suppose the existence of any debt restructuring agreement. All the Court has been availed with are his numerous letters requesting for debt restructuring. In the absence of evidence of acquiescence to his request by applicant, the court is hamstrung to assume any agreement to restructure the debt, particularly since the applicant denies any such agreement.

It is interesting to note that in his heads of argument, the respondent seems to have totally abandoned this argument which he does not address at all, confining himself only to the argument that the interest charged is excessive and thus contrary to the Contractual Penalties Act and the Consumer Contracts Act.

Further, he made no oral submissions at all in this regard, preferring instead merely to stand by his heads of argument. In the premises I am inhibited from making any finding that there was any debt restructuring agreement at all between the parties.

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<sup>3</sup> See *Kingstons Ltd v LD Ineson (Pvt) Ltd* (supra) @ 458-H. See also *Africa Banking Corporation of Zimbabwe Ltd & Anor v PWC Motors (Pvt) Ltd & Ors* 2013 ZLR (1) P376 H and *ZB Bank Limited v Eric Rosen (Pvt) Ltd & 2 Ors* HCH 185/15.

In the premises, I cannot but grant the order sought by the applicant in this matter as I find that the defences raised by the respondent in this matter are not adequate to defeat summary judgment.

**Disposition**

CONSEQUENTLY, IT IS ORDERED THAT

1. The application for summary judgment be and is hereby granted against the respondent as prayed for in terms of the draft order filed of record.

*Muringani Mandikumba & Partners*, applicant's legal practitioners  
*J Mambara & Partners*, respondent's legal practitioners