

STANBIC BANK ZIMBABWE LTD
versus
VEGRA MERCHANTS (PVT) LTD
t/a VEGRA COMMODITIES & 2 OTHERS

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 December 2015 & 20 September 2017

Opposed Application

G Tavenhave, for the applicant
M T Rujawa, for the respondents

CHITAPI J: The applicant applies for summary judgment against the respondent in the sum of US\$26 127.56 with interest at 25.8% per annum from 7 February 2014 to the date of full payment.

Background:

The plaintiff is a banker. In its summons and declaration, it claimed that in August 2012 the bank extended a loan facility agreement to the first respondent for an amount of US\$25 000.00. The purpose of the loan was to enable the first respondent to finance its maize and beans trading business. The loan had a tenure of 90 days. The second and third respondents bound themselves to the plaintiff as co-principal debtors, guarantors and sureties for payment by the first defendant of all amounts due on the loan and executed guarantee agreements to that effect.

The agreement provided for interest to be charged on the facility at the rate of 14% above the plaintiffs base lending rate which fluctuated from time to time. At the time of the execution of the loan agreement, the base rate was 1.85%. Penalty interest was chargeable at 10% per annum over the fluctuating interest. Repayments were to be made in monthly instalments of US\$1 866.00 effective 13 July 2013. The first defendant defaulted in discharging its obligations on the loan with the result that it fell into arrears for 9 months in the sum claimed of US\$26 124.56.

In line with the provisions of the agreement, the plaintiff in the event that it resorted to legal action to recover any amounts due was entitled to demand payment of collection commission and costs of suit on the legal practitioner and client scale. The loan facility agreement was attached to the summon as an annexure E.

The plaintiff also attached to the summons, unlimited guarantees signed by the second and third defendants respectively on 25 August 2012 and 11 July 2013. The second and third defendant's signatures are endorsed as having been verified by the bank. In the unlimited guarantee agreements, the second and third defendants individually bound themselves as guarantors and co-principal debtors for the due payment of the first defendant's "present and future indebtedness to Stanbic howsoever arising." The plaintiff attached to the summons, the schedule of the loan disbursement to show how the amount claimed had been calculated and been arrived at.

The defendant on being served with the summons entered appearance to defend on 4 July 2014. The plaintiff considered that the appearance to defend had been filed as a dilatory tactic and that the defendants did not have a *bona fide* defence to the claim. The plaintiff in answer to the appearance to defend filed for summary judgment. The respondents opposed the application and filed opposing affidavits.

The respondents' defence

The second respondent deposed to an affidavit on behalf of himself, the first and third defendants. The third defendant is the second defendant wife. The third defendant verified the second defendant's affidavit in opposition to the summary judgment application. In addition, the third defendant denied that she signed a surety-ship agreement with the applicant and referred to annexure G attached to the plaintiff's summons. The third defendant averred that one Emmanuel Rwizi is the one who signed the agreement as the guarantor and that on this basis, she was therefore wrongly joined in the claim as a defendant. She prayed for the dismissal of the claim against her.

In regards to the defence raised in the second defendant's affidavit in respect of him and the first defendant, he only queried the interest rate of 25.85% which he attacked as not being the applicable rate. The applicable rate in his deposition was 14% per annum. He deposed that the 25.85% per annum rate was therefore usurious. In addition he stated that the usurious interest rate was being calculated on the sum of US\$221 123.00 and yet the amount claimed was \$26 127.56. In view of the foregoing, the second defendant averred that the plaintiff had failed to verify the claim on the interest rate and that summary judgment ought to be refused.

The Law

Summary judgment is a procedure provided for in Order 10 r 64 of the High Court Rules 1971 – and is available in action proceedings in terms of which a plaintiff who has issued summons against the defendant and the latter has entered appearance to defend, may at any stage before the holding of a pre-trial conference apply to court to enter summary judgment in the plaintiff favour despite the entry of appearance and any other pleadings filed by the defendant. The procedure is available in actions where the claim is liquidated.

Where summary judgment has been sought by the plaintiff, the defendant has two courses open to him or her to resist summary judgment. The first option which is not very much in use but appears to me to be the most convenient one is for the defendant to provide the registrar of this court with such security as the registrar deems sufficient to satisfy any judgment the court may give against the defendant in the case. Obviously, the security must be such that it can cover the plaintiff's claim as claimed in the summons. The non- utilization of this option appears to arise from the fact that the defendants being sued in liquidated claims invariably will have failed to pay on their obligations and would not have the security. I however find this option to be consistent with a genuine denial of liability in that the defendant shows his or her *bona fides* by securing the claim so that any argument that he or she is using delaying tactics to honour his or her obligations is put to rest.

The second option is for the defendant to satisfy the court by affidavit or with leave of the court by oral evidence of him or herself or any other persons who can swear positively to the facts that the defendant has a good *prima facie* defence to the claim. Under this option the defendant can attach documents to support the defence relied upon or where leave to adduce evidence has been granted, to produce documents which verify the defendants defence.

The powers of the court in the hearing and determination of an application for summary judgment are very wide and varied and are provided for in r 67. The rule provides as follows

67. Limitations as to evidence at hearing of application

No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence *viva voce* or by affidavit:

Provided that the court may do one or more of the following–

- (a) permit evidence to be led in respect of any reduction of the plaintiff's claim
- (b) put to nay person who gives oral evidence questions–
 - (i) to elucidate what the defence is; or
 - (ii) to determine whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence is; or
- (c) permit the plaintiff to supplement his affidavit with a further affidavit dealing with either or both of the following–

- (i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or
 - (ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence
- [Proviso substituted by s.i. 25 of 1993]

In addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

The *proviso* to the rule allows the court to permit the adduction of further evidence which includes oral and documentary evidence to satisfy itself that the plaintiff's case is unanswerable on any cognizable legal ground. Where the circumstances of a case require, a court should make use of its powers in this rule so that spurious defences do not unnecessarily delay due relief to a plaintiff. The powers of the court as described should therefore be considered as a tool to give effect to the procedure of summary judgment which was created to facilitate a just, timely and cost effective resolution mechanism of disputes.

It must follow in my view that technical defences should not be a bar to summary judgment where the defendant does not have a defence, otherwise to refuse summary judgment on technicalities will result in an injustice to the plaintiff. I therefore advocate the increased use of the *proviso* to r 67 to ensure that a court can easily resolve technical and spurious defences filed in *terrorum* to simply vex the plaintiff.

Analysis of case and arguments

In the plaintiff heads of argument, the case of *Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors* 1995 (2) ZLR 121 (S) is cited as authority to the effect that in application proceedings, what is not denied in an affidavit by the party who files a response to depositions therein, must be taken as admitted. I agree.

Applying the said authority to the facts of this application, the respondents do not deny that the plaintiff advanced a loan to the first defendant. The fact that the second defendant guaranteed payment of the loan is not disputed. The third defendant denied that she signed a surety agreement with the applicant. She referred to annexure G to the plaintiff's papers being the unlimited guarantee form. She sought to avoid it on the basis that she signed the agreement as a witness and that one, Emmanuel Rwizi is the one who signed as guarantor. She therefore averred that she was wrongly sued as she was not a party to the transaction.

The argument advanced by the third defendant is ingenious but dishonest. Counsel for the third defendant sought to advance the argument and unashamedly so. Counsel should not mislead the court. It is unprofessional and unethical to do so. Annexure G is not a signature

form. On the first page of the same, it is clearly indicated thereon as follows: “UNLIMITED GUARANTEE (TO BE GIVEN BY AN INDIVIDUAL): Given by Nyarai Agness Chitsinde identity number 63-1065521-H-47 (“the Guarantor”) for the indebtedness of VEGRA MERCHANTS (PRIVATE) LIMITED REGISTRATION NUMBER 6867/2000 (“the Debtor”) to STANBIC BANK ZIMBABWE LIMITED (its successor in title and signs hereinafter called (“Stanbic”). The *domicilium citandi et executandi* is given as 34 Cecil Road, Greendale which is the same as that given in annexure F, the unlimited guarantee for the second defendant who is husband to the third defendant.

The unlimited guarantee annexure G is initialled on all the pages. On the last page it has three spaces for signature, two witnesses and one by the guarantor. The third defendant signed on the space reserved for a witness. There was clearly an error on her part to sign on the spaces of the witness because the document being signed was in her name as guarantor. A court cannot be persuaded to hold that such an inadvertent error would vitiate the guarantee agreement. The agreement is considered as a whole in its substance. It is utterly dishonest for the third defendant to state on oath that she was a witness in the transaction merely because she signed on the space for witnesses. I considered calling the third defendant to appear before me together with Emmanuel Rwizi to clarify who the guarantor was. I decided that such an exercise would not be necessary. If Emmanuel Rwizi was the guarantor, the plaintiff would have reflected him as such. The third defendant did not plead that the names appearing on the guarantee agreement were not hers. I have indicated that the third defendant’s counsel has not acted professionally by pleading a spurious defence. This line of defence is accordingly without substance and is dismissed.

The next issue as raised by the second defendant and adopted by the third defendant pertains to the interest rate which the plaintiff has applied in its *duplum* schedule. The defendants argue that the interest rate is a fixed 14% per annum. Again this is not true because the facility agreement gives the plaintiff the right to amend the rate of interest. Further the interest rate was always subject to change and there was also a penalty charge of 10% on overdue repayments or default.

The plaintiff attached as annexure B to the summons a letter of demand written by the plaintiff’s legal practitioners wherein payment of the amount herein claimed with interest was demanded. The defendants admitted in the opposing affidavit of the second defendant that indeed demand was made. The letter of demand is dated 28 April, 2014. Summons was only issued on 13 June, 2014 more than one month after demand was made. The defendants did not

respond to the letter of demand. In short the defendants did not take issue with the claim being made and instead waited for the plaintiff to take the matter further to litigation which the plaintiff did. The defendants cannot seriously take issue with the plaintiff's calculations. In any event, the defendants have not placed before the court their own calculations. Instead the defendants cry to be given their "day in court" without placing the court into their confidence to allege what they will seek to prove. It is not sufficient for the defendants to simply allege that they do not agree with the interest rate claimed and say nothing more. If the interest rate was 14% per annum as claimed by the defendants, they need to allege that they paid up the loan upon a calculation using what they say was the agreed rate. It is wholly insufficient for the defendants to simply state that they want the matter to be dealt with by trial procedure for purposed of having the plaintiff prove an interest rate. There is nowhere in the defendant's papers where they allege that they do not owe the plaintiff anything because payment was made.

As if the paucity of the defendants defence is not enough, they again raise a red herring that a figure of US\$221 123.00 appears in para (b) of the plaintiff's summons. The summons was not a stand-alone document. It was accompanied by a declaration. In terms of order 17 r 115 of the High Court Rules 1971, a declaration alters, modifies or extends claims as stated in the summons. Simply put, where the summons and declaration appear to contradict each other, it is to the declaration that the court will look to or rely upon as setting out the plaintiffs' claim and relief sought in full. The declaration makes no mention of US\$221 123.00. I have already stated what the plaintiff claims in this application and that the defendants denied interest component..

I do accept that summary judgment is a drastic form of relief in which proceedings are curtailed by circumventing a trial. A lot of words and language has been used to describe the procedure for summary judgment and principles applied by the court. In the case *Australian Can Co (Pty) Ltd v Levin & Co (Pty) Ltd* [1947] VLR 332 at 334-335, a judgment of the Australian Appeals Court, it was held as follows in interrogating the summary judgment procedure

"From all this, it appears that where there is a real case to be investigated in fact or in law, leave to defend should be givenwhatever the language various courts have used, it seems to us that the substance of the criterion to be applied is that after the matter involved has been explained to the judge, there must be a real uncertainty without full argument or further investigation of the facts as to the plaintiff's right to judgment."

In the present application I do not entertain any uncertainty as to the plaintiff's right to judgment. The defendants are simply intent on using every trick they can master to avoid liability on the loan. Another example of the defendants' ingenuity lies in their argument that the first defendant's resolution to borrow money from the plaintiff provides that only the second defendant is authorised to stand guarantor. The argument is baseless and limping. The resolution states that the second defendant in his capacity as director be and is hereby authorized to provide the required security as set out in the Facility Letter ("the security") and to sign any documentation in relation to the Security. The argument advanced was that the third defendant was not so authorised to stand guarantor. It is difficult to appreciate the point being made because the resolution did not say that the first defendant could not provide further guarantors when required to as a pre-condition to the grant of the loan facility. The argument is self-defeating in that the first defendant accepted the loan facility after providing guarantees by the second and third defendants who are directors of the first defendant. One is forgiven for asking whether the defendants then obtained the loan under false pretences.

It is important in my view that litigants appreciate that summary judgment procedure is in essence a tool of case management. If used effectively, the procedure discourages the prosecution of cases with little or no merit. In this regard I agree with the observations of LORD ROSKILL expressed in *Ashmore v Corporation of Lloyds* [1992] 1 WLR 446 as follows:

".....In the Commercial Court and indeed in any trial court, it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible Litigants are not entitled to the uncontrolled use of a trial judges time. Other litigants await their turn."

It would therefore be remiss to refuse summary judgment and refer a matter to trial where there are no real issues for the trial court to decide on simply because a defendant considers as in this case that it wants a day in court.

Therefore whilst summary judgment is not a power to be exercised liberally in a democratic society where observance of the rule of law and the right of access to courts must be jealously guarded, it is nonetheless a justifiable process designed to dispose of cases and disputes expeditiously and in expensively. The powers given to the court in r 67 are intended to allow the court latitude to interrogate the plaintiff's claim and satisfy itself that it is unanswerable. It appears to me therefore that summary judgment is a tool which commercial courts should have regard to and use r 67 to expeditiously resolve disputes especially of a commercial nature. As an observation, the money which banks lend to people and business is

the same money which must continue revolving and this is achieved by borrowers paying on their obligations so that there is continued lending by the lending institution and in the process the economy grows.

In short therefore, in summary judgment applications, I find the Canadian Commercial Courts approach as was enunciated in *Jefferson Ford (Pty) Ltd v Ford Motor Company of Australia Ltd* [2008] FCA FC 60 to be of practical use and not detracting from the approach adopted in this jurisdiction in any material particular. The test applied by FINKELSTEIN J in the said case was,

“The real question in every case is not so much whether there is an issue that could arguably go to trial but rather whether there is any issue that should be permitted to go to trial.”

In my interpretation, an issue should be referred to trial if it cannot be resolved on the papers filed in the summary judgment application and where necessary after resorting to the use of the wide powers given to the court by r 67. The issue should also be material to give a just disposal of the dispute.

In this case the defendants have resorted to using dilatory tactics to delay the day of reckoning which inevitably comes as it has now arrived.

I therefore dispose the application as follows:

Summary judgment is granted against the 1st, 2nd & 3rd defendants jointly and severally, the one paying the other to be absolved, in favour of the plaintiff for payment of US\$26 127.56 with interest at 25.85% from 7 February, 2014 to date of final payment and costs of suit on the legal practitioner and client scale.

V. Nyemba and Associates, plaintiff's legal practitioners
Danziger & Partners, defendant's legal practitioners