STEWARD BANK LIMITED
versus
KANGAI MAUKAZUVA

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 21 July 2017 & 29 August 2017

Opposed Matter

T. Sibanda, for the plaintiff
Adv *T Zhuwarara,* for the defendant

CHIWESHE JP: This is an application for summary judgment in terms of r 64. The plaintiff issued summons claiming against the defendant the sum of $47 808-00 being the outstanding amount owed to it by the defendant arising from a personal loan advanced to the defendant. It also claimed interest at the rate of 15% per annum, a penalty on unpaid interest at the rate of 2 % per day from 31st August 2015 to date of payment in full plus costs on the legal practitioner and client scale.

The averments in the plaintiff's declaration are to the following effect. On 22 August 2012 the plaintiff's predecessor company T N Bank advanced a car loan of $46 000-00 to the defendant at his instance. The interest to be charged was set at 15% per annum and the loan would be repaid within a period of 36 months. It was also agreed that interest that remained outstanding on maturity of the loan would attract a penalty rate of 2% per day. All sums outstanding were to be payable on demand and as at 30 November 2016 the sum due was $47 808-00 comprising the outstanding capital plus interest. In breach of the agreement, the defendant failed to repay the debt within 36 months. It was a term of the agreement that in the event of legal action being taken, the defendant would meet the costs on the legal practitioner and client scale.

The defendant has filed a special plea as well as a plea on the merits. The special plea is that the plaintiff's claim is vague and embarrassing in that it is not clear on a reading of para(s) 7 and 9 of the declaration whether the cause of action is premised on the right of the plaintiff to call on the loan on demand or on maturity. Paragraph 7 relates to the premise of the claim as a demand for the payment of the balance whilst para 9 relates to a claim arising

out of failure to pay up the loan as at the maturity date. Thus the declaration is contradictory and not pleaded in the alternative. The claim should thus be dismissed with costs as being vague and embarrassing.

As to the merits the defendant has raised a number of triable issues. Firstly the defendant denies approaching the plaintiff for a loan facility and challenges the plaintiff to produce the loan application signed by him. On the contrary the defendant avers that the car came to him through his employer, Econet, as a condition of service. For this arrangement the defendant entered into a loan agreement with his employer although he understood that the loan would be administered by a bank. Secondly, the defendant argues that the loan became due upon termination of his employ with Econet and that at the time the plaintiff rightfully made its demand against Econet in November 2012 and prescription started running then. Thirdly, as the loan agreement was between him and Econet, the plaintiff needs authority to sue on behalf of Econet, which authority has neither been sought nor granted. The plaintiff therefore has no *locus standi* to proceed with the claim. Fourthly, the defendant avers that Econet set off the debt against his severance package. It is for that reason that the matter had been held in abeyance since 2012. Econet has been acting to recover on the same agreement as it was the principal lender, the plaintiff being a mere administrator. Fifthly, the defendant says the claim has prescribed as the demand for payment was last made more than three years ago. The defendant also states that the evidence and the account statement relied upon by the plaintiff does not support the claim and that the letters of demand, addressed to him by the plaintiff, relate to different amounts which figures are to him vague and confusing. To that extent, argues the defendant, the plaintiff has no case against him and the claim against him should be dismissed. This plea was filed on 8 February 2017.

However, in another development, the defendant had filed an earlier plea in the form of the special plea of prescription on 19 December 2016. The legal practitioners who acted for him in that instance are the same legal practitioners who filed the latter plea on his behalf. In the earlier plea the defendant admits that he borrowed from the plaintiff but that the claim had prescribed. Indeed there was a loan agreement between the parties as evidenced by the car loan facility dated 22 August 2012 and signed by both parties. The document is filed of record as Annexure C.

Being of the opinion that the defendant has no *bona fide* defence to its claim and that appearance to defend and plea had been filed only for purposes of delay, the plaintiff filed the present application for summary judgment to be entered against the defendant. I am afraid the

application cannot succeed for, despite the defendant's inelegant and dishonest pleadings, despite his eventual admission that he has no defence on the merits, it appears to me that the special plea that he raises with regards prescription, establishes an arguable case, a triable issue. The question that begs an answer is: when was the debt due to be paid? In other words when should the prescription period be deemed to have commenced to run? Is it 30 November 2012 when the defendant defaulted in his repayments thereby triggering the provisions under para 7 (1) of the facility, which provides that the facility becomes immediately due and payable in the event of breach. Or is it 21 November 2012 or 23 April 2013 when, on each of those occasions, demand for full payment of the balance was made in terms of clause 12 of the facility? Or is it 31 August 2015, the date of maturity in terms of clause 8 of the facility? The first two cut off dates, would, if upheld as the dates on which prescription commences, entitle the defendant to succeed at the trial. The last date however would, if upheld, leave the defendant vulnerable.

There being a triable issue, namely, when does prescription commence to run in view of the above possible scenarios, I would hold that the plaintiff has not met the threshold required in an application for summary judgment. It cannot be said that the plaintiff's case is unanswerable nor can it be said that the defendant has no plausible defence. The requirements for an applicant to succeed in an application for summary judgment are laid out in a plethora of cases. Summary judgment may be granted when the plaintiff proves that it has a clear and unanswerable case and that the defence raised has no substance in law and in fact. See *Pitchford Investments* v *Muzariri* 2005 (1) ZLR (H). On the other hand, all that a defendant needs to show in order to succeed is that there is a mere possibility of success, that there is a triable issue – See *Jena* v *Nechipote* 1986 (1) ZLR 29 (S).

For these reasons the defendant deserves his day in court. It is accordingly ordered that the application for summary judgment be and is hereby dismissed with costs.

S. Mugugu Law Chambers, plaintiff's legal practitioners
Zinyengere & Rupapa, defendant's legal practitioners