ZB BANK LIMITED
versus
NYASHA MERCY MANDAVA
and
BLESSING MUDZAMBA

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 25 & 28 August 2017

Opposed Matter

Mrs *R. Chikwengo*, for the applicant
J. Ndomene, for the defendant

CHIWESHE JP: The applicant issued summons claiming against the defendant the sum of $12 087-49 being money owed arising from a loan advanced to the first defendant which the first defendant has failed to pay despite demand. The applicant also claims interest at the rate of 45% and costs of suit on the legal practitioner and client scale. The second defendant agreed to be bound as surety and co-principal debtor in respect of the first defendant's indebtedness.

The first defendant entered appearance to defend on 27 October 2014. Being of the view that the first defendant has no *bona fide* defence to its claim and that appearance to defend had been entered solely for purposes of delay, the plaintiff lodged the present application for summary judgment to be entered against the first defendant. The application is opposed.

The founding affidavit is sworn to by Jeff Rukwati, the plaintiff's District Manager. It is to the following effect. On 26 April 2017 the first defendant applied for a personal loan from the plaintiff. The application was approved and the first defendant was advanced $7 400-00. The loan agreement is filed of record. In terms of the agreement the capital sum together with interest thereon calculated at the rate of 25% per annum was due for repayment on or before 30 June 2013. The first defendant defaulted on its repayment. The schedule on the loan account is filed of record. It shows that as at the date of summons the sum owing was $7 116-99 being the capital sum, $4 835-04 being interest and $138-00 being bank charges,

altogether amounting to $12 087-47, the amount claimed in the summons. Clause 9 of the loan agreement allows the plaintiff to change the interest rate charged taking into account among other factors, the Reserve Bank of Zimbabwe Monetary Policy pronouncements. In terms of the Reserve Bank's Monetary Policy dated 31 January 2013, also filed of record, the plaintiff was allowed to charge a maximum penalty interest rate of 12.5% above the contractual lending rate. The plaintiff thus now claims interest at the rate of 37,5% per annum, from the date of default, being 23 May 2014. Although the first defendant had not filed its plea, the plaintiff believes in view of the overwhelming documentary evidence showing the first defendant's indebtedness to it, that the first defendant has no *bona fide* defence to the claim and that appearance to defend has been entered to buy time and that such constitutes abuse of process on the part of the first defendant. For that reason, the plaintiff seeks to be awarded summary judgment.

In its opposing affidavit the first defendant challenges the authority of Jeff Rukwati to depose to the founding affidavit as no proof has been filed to show that he is authorised to represent the plaintiff. Given that the deponent to that affidavit is a responsible official of the plaintiff, no reason has been advanced to show that his authority to represent it should be put in doubt. Accordingly I would for that reason dismiss that point *in limine* without further ado.

In any other respect the first defendant has not proffered any defence at all. She has not denied applying for the loan nor has she denied that she entered into a loan agreement with the plaintiff in terms of which the amount stated was loaned to her. She has not denied receiving the amount claimed, nor has she challenged the rate of interest and the attendant bank charges, nor has she challenged any of the entries appearing in the Loan Account Schedule prepared by the plaintiff. Instead, the first defendant's opposing affidavit makes reference to irrelevant issues which do not raise any defence. For example, she states that the plaintiff was misled by her employer's Director, that the employer, Destiny Travel and Tours, would guarantee the loan. She further states that the said director, one Kudzai Mundangepfupfu also diverted the sum of $3 400-00 from the said loan for her personal use. She does not say whether the plaintiff was party to such diversion and at what point the diversion took place and whether she had consented to it. The guarantee papers reflect one Blessing Mudzamba as the guarantor, not the first defendant's employer as claimed by the first defendant. The first defendant has not challenged the existence of the relevant RBZ Monetary Policy statement dated 31 January 2013 nor has she challenged the manner in

which that policy was brought to bear on the rate of interest ultimately charged. She further states at para 10 of her opposing affidavit that she had not yet filed her plea as she was hoping to resolve the matter amicably. To this end she had instructed her legal practitioners to write to the plaintiff proposing to settle the debt by way of instalments at the rate of $300-00 per month. The letter was written on a "without prejudice" basis and is filed of record.

Finally the first defendant argues that the loan was employer guaranteed and that the plaintiff should pursue Destiny Travel and Tours (Pvt) Ltd instead. As already indicated there are no papers binding the employer in that respect. Even if that were the case, there is no provision in the loan agreement that the plaintiff would be restricted to a remedy against the guarantor only, in the event that the first defendant defaulted. She would still remain liable as the principal debtor.

It would appear that the first defendant might have entered into sub agreements with her employer and indeed other persons. The existence of such other agreements did not involve the plaintiff and should not be raised as a defence against the plaintiff's claim. The employer and any other person are, according to the plaintiff, unknown to it. In any event no evidence has been produced to prove otherwise.

In my view the first defendant has all but admitted the plaintiff's claim. No *bona fide* defence has been proffered nor can it be said that the first defendant has satisfied the requirements of a successful defence in an application of this nature. The first defendant has dismally failed to show that there is a possibility of success in the main matter, or the existence of a plausible case nor has she raised a triable issue or proved the existence of an arguable case nor has she shown that there is a real possibility that an injustice may arise should summary judgment arise. See *Jena* v *Nechipote* 1986 (1) ZLR 29 (S). No facts have been alleged which, if established at trial, would entitle her to succeed in her defence. See *Rex* v *Rhodian Investments Trusts (Pvt) Ltd* 1957 R & N 723, See also *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* SC 139-86 where MCNALLY JA had this to say as to the obligation of a defendant in an application for summary judgment:

> "While the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and the material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence."

The first defendant has not met this threshold.

On the other hand the plaintiff is required, in order to succeed in an application for

summary judgment, to prove that it has a clear and unassailable case against the defendant and that the defence raised, if any, is without substance in law and in fact. See *Pitchford Investments (Pvt) Ltd* v *Muzaviri* 2005 (1) ZLR (H) ….".

Initially the parties had indicated that they wished to settle this matter out of court and sought time to draft a deed of settlement and a draft consent order. However no such agreement was reached and the registrar set the matter down for argument. The first defendant was now represented by Mr *Ndomene* who indicated that his client had no defence to the claim. He was however reluctant to concede to the grant of the application without instructions to that effect from her. He insisted that his client's demand for a payment plan be considered instead. A payment plan is to all intents and purposes an admission of liability. It cannot be a defence on the merits.

I am satisfied that the plaintiff has proved its case and would accordingly order as follows:

1. Summary judgment be and is hereby granted against the first defendant for payment of the sum of $12 087-49 together with interest thereon at the rate of 37.5% per annum with effect from the 23rd May 2014, to date of payment in full.
2. The first defendant shall pay costs of suit on a legal practitioner and own client scale.

Chikwengo & Taongai Law Chambers, applicant's legal practitioners
Maposa & Ndomene Legal Practitioners, respondent's legal practitioners