

NOMATHEMBA BANDA

Versus

FMC FINANCE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA & NDLOVU JJ
BULAWAYO 24 June 2024 & 8 August 2024

Civil appeal

T. Tashaya for the appellant
V.E. Ndlovu for the respondent

DUBE-BANDA J:

[1] This is an appeal against the order of the Magistrates Court sitting at the Bulawayo Magistrates Court (“court *a quo*”). The appellant, Nomathemba Banda, secured a loan from the respondent, FMC Finance (Private) Limited. The respondent contended that the appellant defaulted in her loan repayments and sued for the recovery of the balance outstanding. The court *a quo* granted summary judgment in favour of the respondent. For ease of reference and where the context allows the parties shall be referred to as in the court *a quo* i.e., the respondent as the plaintiff and the appellant as the defendant.

The facts

[2] The plaintiff caused a summons to be issued against the defendant in which it was pleaded that on 11 December 2020, the plaintiff and the defendant agreed to terms by which the defendant would obtain a credit facility from the plaintiff at USD 4,633.21. In breach of the agreement, the defendant failed to repay the loan in full by 27 February 2021. The defendant has only made piecemeal payments to the plaintiff, the result of which the defendant owes the plaintiff the sum of US\$4 483,23. The plaintiff claims payment of US\$4 483.24 with the costs of suit.

[3] The defendant filed an appearance to defend the action, and in answer to the notice to defend the plaintiff launched an application for summary judgment. The application was opposed. In the founding affidavit filed supporting the application, the plaintiff did not state the amount claimed and said the loan was supposed to be settled by 27 February 2021. It

averred that the repayment of the loan and interest was overdue, attached is a copy of the loan agreement and summons. The plaintiff contended that the defendant had no *bona fide* defence to the claim and entered a notice to defend to delay the finalization of the matter.

[4] The defendant filed a notice of opposition, and in the opposing affidavit, she averred that she had a *bona fide* defence to the claim. She contended further that the plaintiff had made an error in calculation. She accepted that she had breached the loan agreement, however disputed that the plaintiff was entitled to payment in the sum of USD\$4 483.24 claimed in the summons. She averred that she had repaid part of the loan in the sum of USD\$2 810. 13 which she contended the plaintiff had not accounted for in its statement. She attached a statement issued by the plaintiff and criticized the plaintiff for its failure to attach a statement of accounts showing the calculations of the outstanding balance.

[5] The plaintiff filed an answering affidavit and averred that it disbursed a loan facility to the level of US\$ 4,632.21 inclusive of interest and management fees. The defendant was to repay the loan in three months instalments of US\$1 544.40 per month. In breach of the agreement, the defendant made a total repayment of US\$1 834.62 leaving a balance of US\$4 632.21. It was further averred that in terms of Clause 8.2 of the loan agreement, the plaintiff was entitled to charge a penalty of 10% per month on the overdue amount. It then charged a total penalty fee of US\$ 1,344.26. It further charged collection commission and tracing costs in the sum of US\$340.10. It then attached a statement of account showing that the outstanding balance was US\$ 4,632.21.

[6] The court *a quo* found that an amount of US\$975.51 reflected as payment in the statement submitted by the defendant, was according to the same statement reversed. And as it was reversed, it was not a payment. The court further found that in total the defendant repaid US\$1 834.62 leaving a balance of US\$4 632.21. Further, the court found that in terms of the loan agreement, the plaintiff was entitled to charge interest and penalties, which it did. The court *a quo* found that the defendant had no *bona fide* defence to the plaintiff's claim and granted an order in the following terms:

- a. Summary judgment be and is hereby entered against the respondent.
- b. The respondent to pay,

- i. Pay the sum of US\$4 483.24 to the applicant together with the prescribed interest from the summons date.
- ii. Pay the costs of suit.

Proceedings before this court

[7] The appellant was aggrieved by the decision of the court *a quo*. She, thus, launched this appeal on the following grounds:

1. The court *a quo* erred in its finding that there was (*sic*) no triable issues or a plausible defence to the respondent's case thereby justifying the granting of the application for summary judgment.
2. The learned Magistrate erred by holding it as a fact that there was a reversal of payment in the sum of US\$975.51 which issue was not raised by the respondent in its papers and was not justified. The appellant made her payments in cash to the respondent and the basis of the said reversal entry has not been clarified.
3. The learned Magistrate erred in letting the respondent get away with producing 2 (two) distinct statements of accounts which would have necessitated the hearing of *viva voce* evidence from the respondent to clarify the issue.
4. The court *a quo* erred in holding that the respondent had charged interests and penalties in terms of the contract without a clear demonstration from the respondent to that effect.
5. Having found that the application for summary judgment had merit the court *a quo* erred in not granting summary judgment on the debt that had been admitted by the appellant and referring the balance of the respondent's claim to trial. The appellant admitted owing the sum of US\$559.48 after having repaid US\$2 810.13 towards a loan of US\$3, 369.61.

Wherefore, the appellant prays that the whole judgment of the Magistrates Court be set aside and an order be made as follows:

- a. The appeal hereby succeeds with costs.
- b. The decision of the Magistrates Court to grant the application for summary judgment under case Number CC 844/21 be and is hereby set aside and substituted with the following order: -
 - i. The application for summary judgment be and is hereby dismissed with costs.

- ii. Alternatively, summary judgment is granted in the sum of US\$559.48 and the appellant be and is hereby granted leave to defend the balance of the respondent's claim.

Issues for determination

[8] Mr *Tashaya* counsel for the appellant abandoned grounds of appeal 2 and 3. From the grounds of appeal reproduced above, it is clear that the appellant's discontent is with the court *a quo's* finding that the plaintiff had made a good case for summary judgment. Therefore, the sole issue that falls for determination is whether the court *a quo* erred in granting the plaintiff summary judgment.

Submissions before this court

[9] In written heads of argument submitted in support of the appeal, counsel for the appellant submitted that the defendant showed that she paid part of the debt claimed, while in the summons and affidavit in support of the application, there is no indication that that defendant made part payment. Counsel submitted that the matter needs to proceed to trial for the plaintiff to explain how it is entitled to the sum of US\$4 483.24 claimed in the summons when the defendant repaid the sum of US\$ 2 810.13. Further counsel submitted that the trial court *erred* in finding that there was a reversal of US\$975.51 payment which issue was not raised in the plaintiff's papers. The defendant made a cash payment and the basis of the reversal was not clarified, it was not argued and only came up in the ruling. It was further submitted that the court had two statements of account with different figures and this required the matter to be referred to trial for an explanation. Counsel criticised the court a court *a quo* in finding that in terms of the contract the plaintiff had charged interests and penalties without a clear demonstration from the plaintiff. No evidence was adduced as to how the interests and charges were calculated. Counsel contended that the total loan amount was US\$3 369.61 and the defendant repaid US\$2 810.13 leaving an admitted balance owing in the sum of US\$559.48, and the court *a quo* should have granted judgment in the admitted amount and referred the balance for trial. Counsel submitted that a case was not made for summary judgment for US\$ 4,483.24.

[10] In written heads of argument, counsel for the respondent submitted that the plaintiff demonstrated how the amount claimed in the summons was arrived at and that it was substantiated by a statement. Counsel submitted that there were no issues with the reconciliation of the amounts. Counsel submitted further that the defendant did not argue that she made cash payments and the statement she produced showed a reversed payment. Further, she produced an old statement which did not show interests and penalties levied on her account. Counsel argued that the defendant filed a notice to defend to delay the finalisation of the matter. She had no *bona fide* defence and the court *a quo* cannot be faulted in granting summary judgment.

The law

[11] Summary judgment is a procedure that protects a plaintiff against an ill-disposed defendant who defends the matter purely to delay its finalization. It is a remedy that is deployed to prevent an abuse of the court procedure by a recalcitrant defendant. The remedy is extraordinary and drastic. It makes inroads on a defendant's procedural right to have its case heard in the ordinary course of events, in that it permits the granting of a final judgment in a defended action without a trial. Summary judgment is granted on the supposition that the plaintiff's claim is unimpeachable because the defendant has no *bona fide* defence to the claim. To succeed the amount claimed must appear from the documents placed before the court. See *Medclinic Medforum Hospital (Pty) Ltd v City of Harare* 2019 (3) ZLR 934 (H).

[12] In *Tavenhave & Machingauta Legal Practitioners v The Messenger of Court* SC 53/14 the court stated thus:

“Summary judgment is a drastic remedy which will only be granted where it is clear that the defendant has no *bona fide* defence and has entered an appearance to defend solely for purposes of delay. Because of the drastic nature of the remedy, a court will not grant it if there is any possibility that the defence raised on papers might succeed. Thus it has been held that a mere possibility of success will suffice to avoid an order for summary judgment and that;

‘all that a defendant has to establish in order to succeed in having an application for 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 may be done if summary judgment is granted.”’

[13] Summary judgment is a drastic remedy because, if it is granted, it deprives a defendant of the opportunity to raise its defence in trial proceedings. It was intended to prevent sham defences from defeating the rights of a plaintiff by delay, and at the same time causing great loss to a plaintiff who is endeavouring to enforce his or her rights. Courts are reluctant to grant summary judgment unless satisfied that the plaintiff has an unanswerable case, and even where it is established that the case is unanswerable, the court nevertheless retains the discretion to refuse to accede to the application. See *Medclinic Medforum Hospital (Pty) Ltd v City of Harare* 2019 (3) ZLR 934 (H). It is on these legal principles that this appeal shall be considered and determined.

The application of the law to the facts

[14] In the summons, the plaintiff pleaded that the defendant obtained a loan facility at the level of US\$4 633.21, and made piecemeal repayments leaving a balance due and owing in the sum of US\$4 483.24. The summons and particulars of the claim do not state the amount repaid, the interests and penalty charges. In the founding affidavit in support of the application for summary judgment, the plaintiff averred that it advanced a loan to the defendant, referred to the Annexures filed of record and stated that the loan and the interests remain due and owing. The Annexure referred to in the founding affidavit is the Statement of Account from 01 August 2020 to 5 October 2021. This Statement of Account shows that on 7 December 2020, the defendant was debited what is called loan disbarment interest for US\$1 263.60. On the same date, she was advanced to a loan for US\$3 201.13. The loan and loan disbursement interest amounted to US\$ 4,464.73. In the answering affidavit, the plaintiff averred that it disbursed a loan facility to the level of US\$ 4,633.21 including interest and management fees. The loan was to be cleared in three monthly instalments of US\$1 544.40 and in breach of the agreement, the defendant repaid a total of US\$1 834.62. It averred that it charged a penalty of 10% per month on overdue amounts which resulted in the sum of US\$1 344.26 and a collection commission in the sum of US\$340.00. The statement produced by the plaintiff opens on 7 December 2020 and closes on 5 June 2021. It shows the total loan to be US\$6 317.86; repayments to be US\$1 834.62 and the balance due to be US\$4 483.24.

[15] In her opposing affidavit, the defendant accepted that she had breached the terms of the loan agreement but disputed that the plaintiff was entitled to judgment for US\$ 4,483.24. She

averred that she had made a US\$2, 810.13 repayment and attached a Statement of Account obtained from the plaintiff. The Statement shows that on 7 December 2020, her account was debited with a loan disbursement interest for US\$1, 263.60 and on the same date she got a loan of US\$3 201.13. The total was US\$ 4,633.21. It shows loan repayments of US\$1 000; US\$250.00; US\$100.00; US\$100.00; USD975. 51 and US\$384.00. The total paid was US\$2 810.13. The statement also shows that the payment of US\$975.51 was reversed, reducing the total amount paid to US\$ 1,834.62. The statement produced by the defendant opens on 7 December 2020 and closes on 26 May 2021. It shows the loan to be US\$5 608.72 and the balance due to be US\$2 798.59.

[16] It is common cause that these two statements emanate from the offices of the plaintiff. The statement produced by the defendant does not show these charges: a loan penalty charge of US\$54.44; penalty interest of US\$368.32; penalty interest of US\$328.32; penalty interest of US\$318.32; penalty interest of US\$279.86 and collection commission of US\$340.39. The total of these charges is US\$ 1,729.26. There is also a dispute turning on the US\$975.51. The statement produced by the plaintiff does not show this amount, and the one produced by the defendant shows that this payment was reversed. In the court *a quo* counsel for the defendant stated that receipts would be produced in the discovery stage.

[17] A litigant seeking summary judgment must establish an answerable case, and verify the cause of action and the amount claimed. The plaintiff does not dispute the statement produced by the defendant, all it says is that it is incomplete and does not show interest and penalty charges. My view is that this submission does not avail the plaintiff, I say so because these two statements cover almost the same period except that the one produced by the plaintiff closes on 5 October 2021. It is important to note that the one produced by the defendant closes on 26 May 2021 and according to the one produced by the plaintiff there are only two payments after 26 May i.e., the penalty interest for US\$279.86 levied on 5 June 2021 and collection commission levied in the sum of US\$340.39 again levied on 5 June. It is also concerning that the USD 975.51 appearing in the statement produced by the defendant does not appear in the one produced by the plaintiff. The contention that it was reversed is not dispositive of this issue, the point is it must appear in the statement and the reverse entry must appear. Further, there must be evidence speaking to the cause of the reversal. What is required in a summary judgment

application is documentary proof, to verify the amount claimed. The plaintiff is a company; it should not encounter any difficulties in producing documentary evidence to verify the amount claimed. Generating two statements with different amounts cannot assist the plaintiff in this case, particularly because the defendant puts the correctness of the amount claimed in issue.

[18] An application for summary judgment may be used only where the merits of the claim are easily ascertainable without the necessity of holding a trial. The amount claimed must appear from the documents placed before the court and the amount claimed must be fixed, certain and speak to the documents filed in support of the claim. In this case, the plaintiff relies on the statement it produced. However, given the statement produced by the defendant originating from the offices of the plaintiff, and having different figures it cannot be said the plaintiff has an answerable case. This is particularly so because right from the summons the plaintiff relied on the statement that it produced. Although the relevant allegations in the defendant's affidavit in respect of the US\$975.51 are somewhat bald, particulars should have been given of how this amount was paid. I also do not accept that in a summary judgment application a defendant can withhold receipts and say they will be produced at the discovery stage. I am nevertheless satisfied that, upon an application of any of the tests I have referred to, that the defendant has shown a *prima facie* defence. In *Jena v Nechipote* 1986 (1) ZLR 29 (SC) the court stated thus: 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"; that "he has a plausible case"; that "there is a triable issue"; or, "there is a reasonable possibility that an injustice may be done if summary judgment is granted."

[19] On the facts of this case, it cannot be said that in respect of the challenge to the correctness of the amount claimed, the defendant has no plausible case or there is no triable issue. There is a reasonable possibility that an injustice may be done if summary judgment is granted for the amount claimed in this matter. Consequently, summary judgment ought not to have been granted for the total amount claimed.

[20] The defendant admitted that the amount of US\$559.48 is due and payable to the plaintiff. In terms of Order 15 r 5(1)(b) the plaintiff is entitled to judgment in the amount admitted by the defendant.

Costs

[21] It is trite that costs follow the results. The defendant has succeeded on whether summary judgment should have been granted on the amount claimed. This court’s finding shows that the court *a quo* was wrong to award summary judgment for the total amount claimed and thus if the defendant had no alternative but to bring the matter on appeal. She is entitled to her costs of suit.

It is accordingly ordered as follows:

- i. The appeal succeeds with costs.
- ii. The judgment of the court *a quo* is set aside and substituted with the following:
“Summary judgment be and is hereby granted in the sum of US\$559.48. In respect of the balance of the claim summary judgment be and is hereby dismissed with costs in the cause.”

DUBE-BANDA J.....

NDLOVU J.....

Concurs

Sengweni Legal Practice appellant’s legal practitioners
Makiya & Partners respondent’s legal practitioners