GLOBE TROT (PRIVATE) LIMITED
versus
PROBADEK INVESTMENTS (PRIVATE) LIMITED
and
PATRICIA MUTOMBGWERA
and
GRANT CHITATE

HIGH COURT OF ZIMBABWE
MAKOMO J
HARARE, 24 November 2021 & 12 September 2022

Opposed Matter, Application for Summary Judgment

P. Mukumbiri, for the applicant
S. Muzondiwa, for the respondents

MAKOMO J: This is an application for summary judgment. The applicant filed summons for the payment of USD$50 000 being money advanced to the respondents *in solidum* as applicant's capital contribution towards a joint venture that was to be formed by the parties. On the principal amount, applicant also claims interest at the prescribed rate from date of institution of proceedings to date of final payment.

The brief facts of the matter, which have not been disputed by the respondents, are that round about October of 2020 the parties concluded a joint venture agreement where it was agreed that as part of its capital contribution, the applicant would advance an amount of USD$50 000 to the first respondent. The first respondent is a duly registered private company whose directors are second and third respondents. The directors represented the first respondent in the negotiations and bound themselves to pay back the amount to applicant if the venture failed to materialize. The nature of business of the proposed undertaking has not been fully disclosed suffice it to state that it involved a proposed mining project at Redwing Mine.

On 28 October 2020, the applicant advanced the said amount to first applicant. The receipt was acknowledged by the second and third respondents in the form of an acknowledgment of debt. The acknowledgment is couched in the following terms:

"ACKNOWLEDGMENT OF DEBT

We, the undersigned directors of PROBADEK INVESTMENT (PRIVATE) LIMITED, do hereby acknowledge that we have received an advance payment from MARK YONG (NR1745769A) the director of GLOBE TROT (PRIVATE) LIMITED in the sum of FIFTY THOUSAND UNITED STATES DOLLARS (USD$ 50 000.00) in cash.

We undertake that the said amount shall be considered as capital if the Memorandum of Agreement between PROBADEK INVESTMENTS (PRIVATE) LIMITED and GLOBE TROT (PRIVATE) LIMITED is successfully implemented.

We further undertake to repay the above-mentioned amount on or before the 30th of December 2020 should the Memorandum of Agreement not be concluded.

THUS DONE AND SIGNED ON THE ……DAY OF OCTOBER 2020."

The document is then dated by pen and signed by the first and second respondents. It is apparent from the instrument that it was executed on two conditions, firstly, that the money was being advanced solely for it to be deployed as capital in the evinced venture had it materialized and, secondly, that the amount would be paid back to applicant on or before 30 December 2020 if the venture failed to come to fruition. It is common cause that the venture failed to eventuate as envisaged.

Following many engagements which resulted in it being concluded that the venture had suffered still birth, the representative of the applicant then wrote to the respondents on 20 November 2020 putting the respondents on notice to pay back the amount advanced in terms of their memorandum of understanding and the acknowledgment of date duly executed. This was followed by another correspondence to the same effect on 7 January 2021. Both letters were never favoured with responses leading to summons being issued on 5 March 2021.

The respondents entered appearances to defend and also filed their pleas to the applicant's claim whereafter the applicant filed the present application. The application is opposed on the usual defence that the respondent has a genuine and sincere defence which is triable or arguable at trial. In both their pleas and opposing papers in this application, the respondents have set up a defence that the amount advanced was not capital contribution as claimed but it was what they term a "commitment fee". They denied that the amount is payable because the applicant had acted deceitfully by going behind their backs and negotiated directly with the corporate rescue practitioner of Redwing Mine which scuttled the envisaged joint venture. As such, it is argued, the applicant should not be paid back his money.

Further to the defence stated above, the defendants have now raised two preliminary points in this application. The points *in limine* are that 1) the applicant's claim is illegal and 2)

that applicant has no cause of claim against the respondents since they only acted in a representative capacity.

THE LAW

The court has an overriding discretion whether on the facts averred by the plaintiff, it should grant summary judgment or on the basis of the defence raised by the defendants, it should refuse it. Such discretion is unfettered. If the court has a doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused.[1]

Summary judgment is a drastic and extraordinary remedy which must be granted only in appropriate circumstances where it is very clear from the facts that the defendant has no defence to the claim. The test is whether on the set of facts before it, the court is able to conclude that the defence raised by the respondent is bogus or is bad in law. What falls to be determined by the court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant's opposing affidavit discloses such a *bona fide* defence that it should refuse summary judgment.[2]

In *E.G. Construction (Pvt) Ltd* v *Faramatsi Motors (Pvt) Ltd* HH356/20 this court restated the law on what a respondent in a summary judgment application must show in order to successfully resist judgment being entered against him, which proposition I associate myself with. It stated:

> "It is trite that summary judgment is an extraordinary remedy against an unscrupulous litigant seeking to frustrate a claim. In that regard, the claim must be clear and unanswerable and the defences inadequate in fact and in law. It is further trite that not every defence will defeat an application for summary judgment. In order to succeed the defences must be clear and complete, disclosing facts upon which they are based as at the time of the claim. Further such defences must be sufficient to enable one to succeed on the merits or at least, place a *prima facie* case before the court to enable it to assess their *bona fides*. Thus the role of the court is to assess whether a *bona fide* defence which is plausible and could possibly succeed has been raised."

In my view, what this means is that it is not sufficient for a respondent to merely raise a defence for it to defeat the applicant's request for summary judgment. It is required of him to place before the court positive and sufficient facts to accompany and support his claim to a defence. It is upon those facts that the court will be able to determine whether or not the applicant's claim will be unassailable at trial. Sufficiency of such facts is a question of value judgment by the court and, of course, the level of proof is less than proof on a preponderance

[1] *Phillips v Phillips and Another* [2018] ZAECGHC 40
[2] Ibid

of probabilities. This is the position in this and other jurisdictions. In *Phillips* v *Phillips & Anor* [2018] ZAECGHC 40 it was held:

> "[22] The affidavit must disclose the nature of defence and the material facts relied upon. The defendant need not deal exhaustively with the facts and eevidence relied upon to substantiate those facts but he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence or not." (Underlining for emphasis)

The above observations of the learned Judge, based as they are on a principle which is identical to the principle of our own law, are applicable to the present case. It is clear therefore that the respondent is required to go beyond mere mentioning of a defence or a triable issue. That contention must be supported by adequate facts. If this were not the case, then, there would be no plaintiff who would succeed in any application for summary judgment for such application would easily be defeated by mere mention of a defence by a respondent without further ado.

Where a point of law is raised, the court is usually loath to grant summary judgment. However, where the raising of the point of law is frivolous and groundless in the circumstances and is made for the same purpose of delaying the day of reckoning, I venture to say that the same considerations must apply. This is so where the position of the law is so trite that no reasonable litigant would expect to get any relief at trial on the point of law raised. In my view the court faced with such defence should not allow the process of the court to be abused and wait for the trial court to make a determination on it. It must be assessed for its viability in an application for summary judgment.

I now turn to consider the points *in limine* raised.

Claim in contravention of the law

It is contended that the ZWL$ is the sole legal tender in all transactions in Zimbabwe and that no person shall demand payment of money in any foreign currency. It is therefore argued that the plaintiff is not entitled to denominate its claim in foreign currency in view of that monetary regime. It is claimed that suing for repayment in USD as the applicant did is prohibited as per the Supreme Court judgment in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *NR Barber & Anor* SC3/20. As a result the summons, on which this application is based, are null and void. The question therefore is whether the summons violate the law as at the time they were filed?

As alluded to, the transaction between the parties took place on 28 October 2020 and the summons were filed on 5 March 2021. The cause of claim is based on the acknowledgment of debt as set out above. The first correspondence to the respondents demanding payment was written on 20 November 2020 and this may be taken as the date when it became clear that the venture had failed and payment became due.

Clearly, the argument is based, with respect, on a misunderstanding of the *Zambezi Gas* case. The case has never been authority for the proposition that after the effective date, courts cannot grant judgment for a claim denominated in foreign currency. The contrary is true. This court held in *Maranatha Ferrochrome (Pvt) Ltd* v *Riozim Ltd* HH 109/21 that:

> "The plaintiff's claim arose during the period of the multicurrency. It was entitled to compute and denominate its loss in a manner that best reflected the value of that loss: see *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) and *AMI Zimbabwe (Pvt) Ltd* v *Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S). The monetary regime originally relied upon by the defendant came into effect only on 24 June 2019. The loss the plaintiff sues on was incurred in February 2017. At any rate, SI 85 of 2020 [Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations] permits quoting in USD." (Underlining for emphasis)

In *Fabiola* v *Louis* HH-25-09 at pg. 5 of the cyclostyled judgment, MAKARAU JP (as she then was) ruled that the court has a discretion to award judgment in a currency that will redress the injury suffered and adequately compensate the injured for that loss. The learned judge held that it would naturally follow that where that currency is the foreign currency as opposed to the local currency, the judgment should sound in the foreign currency as to award damages in the local currency, where the local currency has been rendered valueless by inflation, might be to deny a plaintiff the redress that he or she seeks.

It must therefore be accepted that there is no longer any controversy with regards whether post 22 January 2019, the effective date of S.I.33/19, judgment may be expressed in foreign currency. It is only the payment which must be done in local currency at the prevailing interbank rate on the date of payment/execution. See *Makwindi Oil Procurement (Pvt) Ltd* (*supra*); *Cold Chain t/a Sea Harvest* v *Makoni* SC57/19

No Cause of Claim against second and third respondents.

The language of the acknowledgement of date drafted and signed by the second and third respondents themselves is clear and unambiguous. To assign the literal dictionary meanings of the words used does not yield an absurd interpretation. Any other interpretation would do violence to them. First paragraph begins with the words "We the undersigned directors of.."; and the second paragraph equally states that "We undertake that the said amount

shall be considered as capital…; and finally, the last paragraph declares that "We further undertake to repay the above mentioned amount on or before the 30th of December 2020 should the Memorandum of Agreement not be concluded". In light of these declarations, I do not see how the respondents may now validly seek to be absolved of liability to pay on the contention that they acted as representatives. Surely, if it was only the first respondent to pay it should have been stated. The use of the plural "we" connotes they were bound jointly and severally. In any event the acknowledgment is not even on the company letterhead at least to give the transaction some whiff of corporate status. The only exclusive memorial of what was agreed and acknowledged to by the respondents is that the money was to be considered as capital towards the joint venture, and if the venture failed to eventuate for whatever reason, the respondents (and not first respondent) would pay back.

Basing on the above finding, I do not see where separate personality of the first respondent would be invoked to shield the second and third respondents from liability to pay back. They acknowledged receipt and made undertakings to pay back in their personal capacities. In my view, the transaction was never a corporate one to begin with. The second and third respondents used the corporate personality of first respondent as a sham. They transacted with the applicant personally under the cloak of a corporate transaction. It is as if the agreement was in the category of a *stipulatio alteri*.

The law on this point is that the defendants' defence must be determined on the basis of what appears on the face of the acknowledgment of debt without reference to the explanations which appear in their opposing affidavit. The acknowledgment of debt does not meet the requirements for exclusion of liability.

In his instructive words on a case so strikingly similar to the present one in *Clan Transport Co (Pvt) Limited* v *Pemhenhayi & Anor* 1999(1) ZLR 520 (HC) at 523 CHATIKOBO J stated:

> "In deciding whether the instrument, on the face of it, indicates that the defendants signed in a representative capacity, one considers the instrument as a whole in search of inferences or obvious conclusions, to be gathered from its terms, bearing in mind at all times that the "question has to be decided not according to other documents or allegations but according to the tenor of the cheque which on the face of it renders both defendants jointly and severally liable": per Leon J in *Trust Bank Ltd* v *Dugmore & Anor* 1972 (3) SA 926 (D) at 931A."

In that case the defendants were signatories on a cheque which was dishonoured. The cheque bore the words "LC Agencies" above their signatures, but no words indicating that LC Agencies was a company. The defendants put no words indicating that they were signing as

agents for or representatives of LC Agencies. When the plaintiff applied for summary judgment against them personally, they pleaded that they were not personally liable as it was apparent *ex facie* the cheque that the cheque belonged to LC Agencies and they were only signing as directors.

While the above case related to a cheque, I am of the view that the principles apply equally to an acknowledgment of debt and all other liquid documents. I therefore conclude that there is no need to lift the corporate veil as the circumstances are clear that the second and third respondents bound themselves to repay, one paying the other to be absolved, in the event of failure of the deal to reach consummation. Thus, the point of law patently lacks merit such that it cannot be a triable issue and has been raised solely for the purpose of delay. It will therefore not succeed.

ON THE MERITS

As stated, the defence is that the money was a "commitment fee" which was never meant to be repaid. It is denied that it was capital contribution. It is further claimed that the money will not be paid for the reason that applicant went behind their backs and negotiated on his own with the corporate rescue practitioner which prevented the venture from being successful. While the two rungs of the defence are mutually exclusive, it is difficult to comprehend how these defences will constitute triable issues in light of the respondents' own acknowledgment which they drafted and signed. No other evidence has been placed before me contradicting that self-explanatory acknowledgment of debt. This only demonstrates lack of *bona fides* of the defences. They are not genuine and sincere.

I reach the conclusion, therefore, that the respondents have no genuine and sincere defence to the claim and the application ought to succeed.

DISPOSITION

In the result, it is ordered that:

1. Summary judgment be and is hereby entered against the respondents, jointly and severally one paying the other to be absolved, for the payment by respondents to the applicant of US$50000 or ZWL$ equivalent calculated at the prevailing interbank rate on the date of payment.
2. The respondent pays the cost of suit.

Masiye-Sheshe & Associates, applicant's legal practitioners
Samkange Hungwe Attorneys, respondents' legal practitioners