AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
versus
PAUL EDWARDS SHIPPING (PRIVATE) LIMITED
and
EDWARD MUTAMBANADZO
and
BEAULAH MUTAMBANADZO
and
FREVO INVESTMENTS (PRIVATE) LIMITED
and
PASIVATE INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 14 February 2013 and 28 May 2013

T. Mpofu for the applicant
T. Thondhlanga for the respondents

ZHOU J: This is an application for summary judgment. The applicant, a commercial bank, issued summons against the respondents claiming payment of a sum of US$280 961.94 as the balance outstanding in terms of a loan facility availed to the first respondent in May 2011. The summons was issued on 28 March 2012. The other four respondents are cited on the basis that they executed deeds of surety-ship in favour of the applicant for the due fulfilment of the obligations owed to the applicant by the first respondent. In addition to the claim for the amount stated above and interest at a rate of 40% per annum the applicant prays that certain immovable property described in the declaration be declared to be executable. The applicant also claims that certain items which were acquired and given to the first respondent in terms of the facility and were the subject of a lease finance agreement be delivered to it. Finally, the applicant claims costs on a legal practitioner and client scale together with collection commission. The respondents entered appearance to defend. The applicant responded by instituting the instant application for summary judgment. The background to the dispute may be summarised as follows:

In May 2011 the applicant granted a facility to the respondent of up to US$300 000. In its particulars of claim the applicant attached a copy of a facility agreement dated 9 May

2011 and averred that that is the date on which the facility was offered. The affidavit filed in support of the application for summary judgment relies on the same agreement. The respondents on the other hand attached to their opposing affidavits an agreement dated 24 May 2011 which they said replaced the first memorandum of 9 May 2011. Mr *Mpofu* conceded that the correct agreement is embodied in the memorandum of 24 May 2011. He, however, argued that nothing turns on the two documents other than the question of the security tendered and the liability of the fourth and fifth respondent. He pointed out that the amount of the facility remained the same and that the first respondent accessed the money loaned in terms of the facility on 11 May 2011 before the memorandum of 24 May 2011 was written. He further submitted that the amount of US$280 961.94 which is being claimed by the applicant is not disputed by the respondents.

The respondents oppose the claim on the following grounds;

(a) that the written agreement of 9 May 2011 relied upon by the applicant was substituted by the one dated 24 May 2011;

(b) that the debt is not yet due, as the facility was for a period of twenty-four months up to May 2013;

(c) that in terms of the agreement of 24 May 2011 the fourth and fifth respondents did not guarantee the liability of the first respondent to the applicant; and

(d) that in terms of the agreement of 24 May 2011 properties described as Remaining Extent of Subdivision B of Lots 15, 16, 30, 31, 32 and 37 of Block C of Hatfield Estate and Stand 636 Ruwa were not tendered as security, and the title deeds for these properties were returned to the respondents. The respondent further submits that the applicant is not entitled to claim the property which was being leased under the lease finance as well as the amount loaned in terms of the facility. The applicant did not seek leave to file an answering affidavit in response to the factual averments made in the opposing affidavit. In the case of *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs & Excise & Ors* 1993 (2) ZLR 121(S) at 127F, McNALLY JA said:

"The simple rule of law is that what is not denied in affidavits must be taken to be admitted."

I will, therefore proceed, as I should, on the basis that the factual averments made in the opposing affidavit are admitted. In any event, the agreement of 24 May 2011 speaks for itself as to the guarantors and the security given.

Summary judgment is an extraordinary and drastic remedy which is allowed where a plaintiff has an unanswerable case and ought not be put to the expense and delay of a trial. *Majoni* v *Minister of Local Government* 2001 (1) ZLR 143(S) at 144A-B*; Central Africa Building Society* v *Ndahwi* 2010 (1) ZLR 91(H) at 94F-G; *Pitchford Investments (Pvt) Ltd* v *Muzari* 2005 (1) ZLR 1(H) at 3D-E. An affidavit filed by or on behalf of an applicant in summary judgment proceedings must verify the cause of action as set out in the summons and aver a belief that the appearance to defend entered by the respondent is not *bona fide* but was entered for the purpose of delaying the proceedings. See *De Anguiar* v *De Almeida* 1989 (2) ZLR 165(H) at 168C-E; *Chindori-Chininga* v *National Council for Negro Women* 2001 (2) ZLR 305(H) at 309C-D. On the other hand for a respondent to successfully oppose summary judgment he must show a good *prima facie* defence to the applicant's claim. The respondent must allege facts which if proved at the trial would entitle him to succeed. See *Kingstons Ltd* v *LD Ineson (Pvt) Ltd* 2006 (1) ZLR 451(S) at 458F-G; *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235(H) at 238D-239B; *Jena* v *Nechipote* 1986 (1) ZLR 29(S) at 30D-E.

The defence tendered by the respondent must be valid at law and must not be inherently unconvincing. See *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Anor* 2010 (1) ZLR 227(H) at 233B; *Niri* v *Coleman & Ors* 2002 (2) ZLR 580(H) at 585A-B.

The admission by the applicant that the operative agreement was that of 24 May 2011 makes its claim answerable to the extent that the facility letter of that date contains matters which affect the relief being sought by the applicant. While the amount availed under the facility was the same, there are significant differences in the terms contained in the two agreements and have a bearing on the relief being sought by the applicant. In the draft order filed the applicant persists with its claim against the fourth and fifth respondents notwithstanding the allegation by the respondents that the two did not bind themselves as sureties under the agreement of 24 May 2011. Also, the applicant insists on an order declaring the Ruwa property and the Hatfield property to be executable. Yet the respondents' averment in the opposing affidavit that those properties were not part of the security given for the loan was not disputed by the applicant. The respondents attached to the opposing affidavit a letter from the applicant dated 30 May 2011 confirming the release of title deeds in respect of 51 Saint Andrews, Hatfield, 636 Ruwa Township, and Stand 41 Inyanga Township.

Given the above facts, the applicant has not established a case for summary judgment against the fourth and fifth respondents. Also, the applicant's claim for the property referred to in para(s) (ii), (iii) and (iv) of its draft order to be declared executable is not unanswerable.

As for the claim for the sum of US280 961.94 and interest at the rate of 40% per annum, the respondents' contend that the amount is not yet due. The amount outstanding and the rate of interest are not disputed. According to the respondents the amount would only become due in May 2013 "since the facility was for a period of 24 months". The respondents rely for that contention on clause 4 of the memorandum signed which states:

> "The Lease facility and working capital amount shall be made available for a period of 24 (Twenty Four) and 12 (Twelve) months from date of drawdown respectively."

It is clear that the above statement relates to the period of availability of the funds availed in terms of the facility and not to the repayment of the amounts withdrawn. The respondents cannot genuinely argue that the facility agreement only obliged them to repay the money after a period of twenty-four months. At the time that the summons was issued they had paid a sum of US$67 488.7415 thereby reducing the debt to the amount being claimed. In any event, the respondents do not explain why they have not repaid the portion of the facility which relates to working capital which had a stated period of twelve months if they understood clause 4 to mean that the debt only became due after the period stated. In my view the respondents' defence on this claim is seriously and inherently unconvincing. It is certainly not a "plausible case" to suggest that a financial institution would give a facility and allow a drawdown on it without any repayments being made until after a period of twenty-four months. See *Kingstons Ltd* v *LD Ineson (Pvt) Ltd (supra)* at 458F.

The applicant also claims the return to it of motor vehicles and trailers which were leased to the first respondent in terms of the facility agreement. The respondents oppose that claim on the basis that the applicant cannot claim the return of the leased property while at the same time claiming payment of the balance outstanding in terms of the facility agreement. That argument is not valid at law. The motor vehicles are to be recovered because the first respondent failed to pay the rent for them. They belong to the applicant. The first respondent was leasing them.

Order 10 Rule 73 of the Rules of this Court provides as follows:

"If on the hearing of an application made under this Order it appears –

(a) that a defendant is entitled to leave to defend and some other defendant is not so entitled; or

(b) that a defendant is entitled to leave to defend as to part of the claim;
the court may –

(i) give leave to defend to a defendant so entitled thereto and give judgment against a defendant not so entitled; or
(ii) give leave to defend to the defendant as to such part of the claim, and enter judgment against the defendant as to the balance of the claim;

or make both orders mentioned in (i) and (ii)."

This is an appropriate case for the application of the above Rule, as the respondents have shown that they do have good *prima facie* defences in respect of some of the applicant's claims.

I do not think that the applicant is entitled to claim collection commission in circumstances where it recovers costs on an attorney-client scale.

In the result, it is ordered as follows:

1. Summary judgment be and is hereby granted in favour of the applicant against the first, second and third respondents jointly and severally, the one paying the others to be absolved for payment of a sum of US$280 961.94 together with interest thereon at the rate of 40% per annum from the 1st April 2012 to the date of payment in full.
2. The claim for summary judgment against the fourth and fifth respondents is dismissed, and the two respondents are given leave to file their plea to the applicant's claim within ten days from the date of this order.
3. Summary judgment is refused in respect of the applicant's prayer to have the properties described as Stand 636 Ruwa, Stand 41 Inyanga Township, and the Remaining Extent of Subdivision B of Lots 15, 16, 30, 31, 32 and 37 of Block C of Hatfield Estate to be declared executable. The respondents are given leave to defend this claim by filing their plea within ten days from the date of this order.
4. The first respondent shall deliver to the applicant the following trailers and motor vehicles:
   (a) Trailer with Registration number ABJ9701 and Chassis number TLHU849;
   (b) Paramount trailer with Registration number AAS7778 and Chassis number AA9G227MA4AKA1843;
   (c) Daf LF45-170 with Registration number ABS5822, Engine number 565972 and Chassis number XLRAE48BFOL248943;
   (d) Volvo FM7 box with Registration number ACE0349, Engine number 110983 and Chassis number XA290898;

(e) Volvo horse with Registration number ABS5658, Engine number 12019471 and Chassis number IN259241;
(f) Volvo 660 horse with Registration number ABS5553, Engine number 1201764 and Chassis number IN311541;
(g) International truck with Registration number ABQ4664, Engine number 11863266 and Chassis number C047320; and
(h) Kenworth truck with Registration number ABS5539, Engine number 3055280 and Chassis number J858327DOD.

5. The costs of this application shall be paid by the first, second and third respondents jointly and severally the one paying the others to be absolved.

Gill Godlonton & Gerrans, applicant's legal practitioners
Thondhlanga & Associates, respondents' legal practitioners