CBZ BANK LIMITED
versus
GRAVER NHAMBURO NYAMUYARUKA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE,18 March 2016 and 18 May 2016

Opposed matter

Ms *S A Wabatagore*, for the applicant
T K Hove, for the respondent

MATANDA-MOYO J: This is an application for summary judgment. The applicant who is the plaintiff in case number HC 8036/14 issued summons against the respondent for payment of $112 303.70 in respect of a loan advanced to the respondent which despite demand, the respondent has failed to settle. The respondent entered an appearance to defence and subsequently filed his plea. The applicant seeks summary judgement on the basis that the respondent has no *bona fide* defence to the applicant's claim and the plea has simply been entered to delay payment. The respondent opposed the granting of summary judgement on the basis that the interest rates charged by the applicant are usurious and contrary to public policy. He argued that it is now settled that once one has challenged the rates of interest, oral evidence should be led on the issue of interest. The respondent also alleged that there is a similar matter pending where the applicant has sued Lomagundi Poles (Pvt) Ltd for the same amount-HC case number High Court 4058/12 refers. The matter is therefore *lis pendis*. The respondent argued that the two matters ought to have been consolidated. It is also the respondent's case that since Lomagundi Poles is the primary, debtor, the applicant is obligated to proceed against the principal debtor first before proceeding against the respondent herein who is a co-principal debtor and guarantor. The respondent also challenged the claim for collection commission and costs on a higher scale. The respondent avers that the applicant should only claim costs. Claiming both legal costs and collection commission amounts to double dipping.

The first issue falling for determination is whether the defence of *lis pendes* is available to the respondent. The respondent submitted that the applicant has already sued the principal debtor for the same amount and such matter is pending before the court. The applicant should not be allowed to sue for the same claim from the respondent without availing to court that the respondent is jointly and severally liable with Lomagundi Poles to the applicant. To do so offends against the principle prohibiting multiplicity of proceedings.

The applicant provided two arguments to the above; firstly the applicant disputes that the claim relates to the same loan. The applicant submitted that case 8036/14 and case HC 4058/12 relate to separate loans.

I have perused the two matters and from a reading of the two matters the principal debtor in both matters is Lomagundi Poles (Pvt) Ltd. Under HC 4058/12 the applicant suggests it lent $50 000 to Lomagundi Poles on or around 2 June 2009. On or around 10 November 2009 another $40 000 was lent to Lomagundi Poles. A notarial covering bond was registered as security under Deed number 1236/09. The applicant in the matter *in casu* is claiming $112 303.70 from the respondent. This amount arises from an overdraft facility granted to Lomagundi Poles (Pvt) Ltd by the applicant not exceeding $65 000.00 sometime in January 2010. Such facility expired on 31 December 2011. The respondent on 3 July 2009 bound himself as guarantor, co-principal debtor and surety of Lomagundi Poles (Pvt) Ltd. It is in that capacity that the applicant is proceeding against the respondent.

A reading of the applicant's pleading tends to suggests on one hand that the two cases raise two different causes of actions. HC 4058/12 deals with loan advanced to Lomagundi Poles in 2009 and HC 8036/14 deals with an overdraft facility offered to Lomagundi Poles in 2010 and accessed in 2011. On the other hand the papers in HC 8036/14 seems to suggest the figure of $112 303.70 includes the claim under HC 4058/12. Once that confusion exist in the court's mind then summary judgement ought to fail.

It is clear that the security for all loans is the same. If that be so the defence of *lis pendes* is available to the respondent as the two cases relate to basically the same cause of action. The defence of *lis pendes* is available where the defence of *res judicata* is available. See *Spencer* v *Memani* (2013) ZASCA 146, *Caesarstone Sdot-Yam Ltd* v *The World of Marble and Granite* CC (741/12) (2013) ZASCA 129, *Evavin Construction CC* v *Twin Oaks Estate Development (Pty) Ltd* (1573/10) (2012) ZANWHNC 27. Four requirements have to be satisfied; that is

". Pending litigation
. Between the same parties
. Or their privies
. Based on the same cause of action; and
. In respect of the same subject matter."

The respondent is the surety of Lomagundi Poles (Pvt) Ltd with regard loans and overdraft facilities offered by the applicant. The question is whether the debts sued in the above two cases related to the whole debts owed by Lomagundi Poles to which the respondent is a surety. The respondent avers it's the same debt.

It is not very clear at this stage whether the debts are indeed different. Oral evidence would have to be led to ascertain that. It is smarter for a party to sue a principal debtor and a guarantor or surety jointly and severally to avoid duplications of suits. This will also ensure that court rolls are not congested. To allow parties to separate claim as in this case would lead to congested court rolls and a waste of the court's time. In *Socratous* v *Crindstone Investment* 2011 (6) SA 325 (SCA) the court held that;

> "South Africans courts are under severe pressure due to congested court rolls, and the defence of *lis alibi pendes* must be allowed to operate in order to stem unwarranted proliferation of litigation involving same parties based on the same cause of action and related to the same subject matter."

The same is true of Zimbabwean courts at the moment. It is my view that where parties are the same, the courts should allow the defence of *lis pendens* to decongest the court rolls.

The principle behind a plea of *lis alibi pendens* and *res judicata* are, like in estoppel also founded on public policy to avoid a multiplicity of actions in order, amongst others, to conserve the resources of the courts and litigants. The plaintiff issued summons against Lomagundi Poles (Pvt) Ltd and without withdrawing same proceeded with a similar action against the respondent herein. The applicant has not even bothered to consolidate the two matters and neither has it sought to link the two by informing the court that the two defendants are jointly and severally liable.

In order for a court to grant an application for summary judgement, the outcome should be obvious. The court must satisfy itself that in considering all evidence to be put forward by the applicant, no court could disagree with the applicant. In that scenario summary judgement is appropriate. The court should satisfy itself that there are no material

disputes of facts and that in applying the law to the undisputed set of facts one party is clearly entitled to judgement.

It is my view that the applicant has failed to show that HC 4058/12 and HC 8036/14 refer to different cause of action, regard being had to the fact that the due date for the loans in both matters is 31 December 2011. Both matters refer to the same mortgage bond. In 4058/12 the loans agreement were not attached and it is not clear at this stage that indeed the two matters relate to different causes of action.

It is my considered view that summary judgment should fail until there is clarity on whether the two cases referred to above are similar or different.

Accordingly, it is ordered as follows;

The application for summary judgement fails and is dismissed with costs.

V. Nyemba & Associates, plaintiff's legal practitioners
T. K. Hove & Partners, defendant's legal practitioners