

ZIMBABWE COVER LEGAL AID TRUST
versus
CLAUDIOUS TAUNZWASURE CHIROCHANGU

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 12 January 2016 & 20 January 2016

Opposed application – Summary judgment

T Zhuwarara, for the applicant
L Uriri, for the respondent

MUREMBA J: This is an application for summary judgment for the payment of US\$41 580-00, payment of interest on the amount at the rate of 20 % per month calculated from 24 November 2014 to date of full payment. Alternatively, in the event of the respondent failing to pay the capital amount and interest within the time to be fixed by this court, the applicant wants an order declaring a certain piece of land situate in the District of Umtali called stand 1939 Umtali Township of Stand 1933A Umtali Township measuring 3 703m² registered under mortgage bond no.3091/2014 especially executable and costs of suit on a legal practitioner and client scale.

This application was made after the respondent had entered an appearance to defend. The applicant states that in November 2014 it extended a credit facility in the sum of US\$41 580-00 to the respondent. Pursuant to that, the respondent registered a mortgage bond in favour of the applicant as security. Interest was to accrue at the rate of 20% per month calculated from the date of registration of the mortgage bond which was 24 November 2014. The capital debt and interest were to be paid within 3 months in equal instalments with effect from the end of the first month in which the bond was registered. The respondent failed to pay the instalments and is in arrears of US\$41 580-00 plus interest.

In opposing the application, the respondent gave a detailed background of what caused him to borrow the money. He said that he had obtained a good emerald mining claim, but did not have the money to finance its pegging and registration of the mining rights. He said he decided to borrow the money since he did not want to lose the claim. He engaged one Constance Chimusara whom he asked to find him any person who could lend him US\$10 000-00 as this was enough to cover all the costs for pegging and registration. He said that in November 2014 this Constance Chimusara took her to the office of Mr. Mupindu who is the now legal practitioner for the applicant. Mr. Mupindu was introduced to him as a legal practitioner. Mr. Mupindu agreed to give him a loan of US\$10 000-00 on condition he surrendered his title deeds for his house in Mutare. Mr. Mupindu demanded interest of US\$10 000-00 per month which is 100 % per month. He also said he wanted to be paid \$1 580-00 in order for him to travel to Mutare to view the house. They agreed that the debt would be settled in full in 3 months. He said that Mr. Mupindu then asked him to sign certain documents which he signed without reading for the reason that although he is a 63 year old retired education officer from the Ministry of Education, his eyesight is now a problem. The other reason that he gave was that since he was dealing with a lawyer, he trusted him to be an honest person. He said that he did not seek to establish the details of the document except that it detailed what he believed was the loan of US\$10 000-00 that he borrowed. He said that on that day Mr. Mupindu took the title deeds and on the next day Mr. Mupindu went to Mutare to see the house. He took some photographs of the house. On Monday the respondent went with Constance Chimusaru to Mr. Mupindu's office here in Harare to collect the US\$10 000-00. He signed some documents and Constance Chimusaru signed as a witness. Following this, the applicant proceeded to register his mining claim. He even attached documents pertaining to the mining claim as proof. He said that when he was expected to repay the loan he failed to raise the money and thus defaulted in his payments.

The respondent vehemently denied ever borrowing money from the applicant and stated that he does not even know Mary Zimbiti the managing director of the applicant who deposed to the founding affidavit. He said that Mr. Mupindu never told him that he was getting a revolving loan and said in any case Mr. Mupindu is not a bank and as such he could not have offered him such a facility. He denied that he entered into a credit facility agreement whereby he would be charged interest at the rate of 20% per month. He said that Mr. Mupindu told him that in 3

months the interest would be US\$30 000-00 plus capital of US\$10 000-00 and \$1 580-00 for the trip to Mutare to view the house. The total would be US\$41 580-00. He said that Mr. Mupindu never told him that he would register a mortgage bond over his Mutare house. He said that he just thought that Mr. Mupindu only wanted the title deeds as security for the loan. The respondent averred that the applicant is not known to him and as such cannot sue him on behalf of Mr. Mupindu. He averred that Mr. Mupindu never told him that he was acting on behalf of the applicant. He said that his defence is *bona fide* and averred that Mr. Mupindu's actions were fraudulent. He said although he was made to sign some documents by Mr. Mupindu he was not given the copies of those documents that he signed.

Constance Chimusaru filed a supporting affidavit to the respondent's case. She confirmed the respondent's story about how he ended up borrowing US\$10 000-00 from Mr. Mupindu. She said that she even signed as a witness. She said that she witnessed the respondent being given US\$10 000-00. She also said that the respondent was not given any copies of the documents that they signed. The supporting affidavit was filed on 24 June 2015. However on 9 July 2015 this same Constance Chimusara had another affidavit filed saying that she wished to withdraw the supporting affidavit that she signed on 24 June 2015 at Warara and Associates, the then lawyers for the respondent. She said that that affidavit was prepared in her absence and she was only made to sign. She said that when she signed it she did not read through it. She said that she does not know the contents therein. She further said that the contents are not a true reflection of what transpired.

On 15 July 2015, the applicant then filed an answering affidavit to which it attached some documents but I disregarded it because in terms of r 67 (c) of the rules of this court, i.e. High Court Rules, 1971 the applicant in an application for summary judgment, can only file a further affidavit to supplement his affidavit with the leave of the court. No such leave was sought in the present application. At the hearing Mr. *Zhuwarara* conceded that that answering affidavit had been improperly filed. I will therefore strike out the answering affidavit.

The purpose of the relief of summary judgment is to enable a plaintiff with a clear and unassailable claim to obtain a swift enforcement of its claim against a respondent who has no *bona fide* defence to the claim.¹ In the present matter Mr. *Zhuwarara* argued that the applicant's

¹ *Zimplastics (Pvt) Ltd v Corbert* HH 32-15

claim is clear and sufficiently laid out. Mr. *Zhuwarara* stated that the respondent borrowed money from the applicant and acknowledged receipt of the money in an acknowledgment of receipt dated 24 November 2014. However, I must point out that that acknowledgment of receipt which the respondent is alleged to have signed is not part of the application. He said that that acknowledgment of receipt clearly stipulates the amount owed by the respondent which is proof that the respondent owes the applicant the amount so claimed. He said that in that acknowledgment of receipt the respondent admits being advanced US\$41 580-00 and he even stipulates the manner in which he was going to pay. He argued that in the face of conclusive documentary proof substantiating the applicant's claim it is beyond debate that summary judgment should be granted. I am however not satisfied that the applicant has laid out a clear and unassailable claim. This is because that acknowledgement of receipt which Mr. *Zhuwarara* was talking of was not attached to the founding affidavit. This acknowledgement of receipt being the vital document showing that the parties entered into a credit facility agreement should have been an annexure to the applicant's founding affidavit. However, instead of attaching this document the applicant only attached the mortgage bond which was registered by Mr. Mupindu. That document bears no signature of the respondent except that it says Mr. Mupindu appeared before the Registrar of Deeds having been duly authorised thereto by a Power of Attorney granted to him by the respondent. With the averment by the respondent in his opposing affidavit that he never authorised Mr. Mupindu to register a mortgage bond over his property it is clear that the applicant ought to have attached to the founding affidavit, the Power of Attorney as an annexure. In the absence of these two documents it cannot be said that the applicant has managed to prove that its claim is clear and unassailable. The claim should be beyond reproach and not need filing of further affidavits.

On the other hand the respondent should disclose a defence and material facts upon which that defence is based with sufficient clarity and completeness so as to persuade the court that if proved at trial such facts will constitute a defence to the claim.² In *Kingstons Ltd v I D Inveson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 458 F-G and 459 A Ziyambi JA said that not every defence raised by the defendant will succeed in defeating the plaintiff's claim for summary

² as per Mathonsi J in *Banc ABC v PWC Motors (Private) Limited & Others* HH 123-13, *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 239 A-B

judgment. The defendant must raise a *bona fide* defence. He must allege facts which if established will entitle him to succeed. He must give the court sufficient information to enable it to assess his defence. He however does not have to prove it.

Mr *Zhuwarara* argued that the respondent is at law bound by the signatures he affixed to the documents i.e. the principle of *caveat subscripto*. Whilst he is correct on the legal position, it should however be noted that the respondent gave a detailed account of how he ended up borrowing money from Mr. Mupindu and not from the applicant. He averred that Mr. Mupindu acted fraudulently when he dealt with him. He averred that he never went to the applicant's offices, but to Mr. Mupindu's. He said that Mr. Mupindu never said that he was acting on behalf of the applicant. He said that he never agreed to interest of 20% per month because it was too exorbitant for him. I consider the defence to be *bona fide*. If he succeeds in establishing his averments at trial it will constitute a defence to the applicant's claim.

It is my conclusion that the applicant failed to establish a clear and unassailable claim. On the other hand the respondent has raised a *bona fide* defence to the applicant's claim. For these reasons I therefore dismiss the applicant's application for summary judgment with costs.

Mupindu Legal Practitioners, applicant's legal practitioners
Uriri Attorneys-At Law, respondent's legal practitioners