INTERFIN BANK LIMITED t/a INTERFIN BANKING CORPORATION LIMITED
(a commercial bank in liquidation by an order of court represented herein by the Deposit Protection Corporation in its capacity as liquidator)
versus
RITESH DHIRAJLAL ANAND
and
POTAIN INVESTMENTS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17 November 2015, 22 January 2016

Opposed Application

D. Halimani, for the applicant
M. Moyo, for the respondent

CHIGUMBA J: This is an application for summary judgment as against both respondents jointly and severally, the one paying the other to be absolved, for payment of the sum of USD$148 887-67 together with interest thereon at the rate of 15% per annum calculated monthly in advance and compounded monthly in arrears reckoned from 30 May 2014 to the date of payment in full. The applicant seeks an order that a certain immovable property be declared specially executable, as well as costs of suit on a legal practitioner client scale, and collection commission.

Mr. Peter Lewis Bailey was appointed curator of the applicant by the Reserve Bank of Zimbabwe on the 11th of June 2012. His mandate was subsequently extended to 31 December 2014. He deposed to a verifying affidavit attached to the application. He averred that this is an application brought in terms of Order 10 r 64 of the rules of this court, and verified the cause of action, as well as the amount claimed in the summons. Mr Bailey averred further, that the respondents do not have a b*ona fide* defence to application. In terms of the summons issued on 10 June 2014, the first respondent at all material times was a customer of the applicant operating

account number 1721-227097-016. The parties entered into an agreement on the 1st of October 2010, in terms of which applicant agreed to provide the first respondent with a loan facility in the sum of USD$165 000-00 which was repayable in one tranche by 30 September 2011. The terms of the loan facility are common cause. That the first respondent breached the agreement between the parties by failing to repay the loan in full by the agreed date, is also common cause.

On the 11th of June 2012 the plaintiff was placed under curatorship by the Reserve Bank of Zimbabwe. In terms of the respondents' plea, filed of record on 4 August 2014, the respondents averred that they had been allowed to repay the loan in installments and not in one tranche as claimed in the summons. The respondents denied having agreed to pay an establishment fee of 5%. The respondents disputed that the applicant was entitled to charge penalty interest prior to 30 September 2011. The respondents also denied that the applicant was entitled to an order declaring their immovable property specially executable, or that they signed the power of attorney which was used to register a mortgage bond over the property. Finally, respondents took issue with the calculation of interest and its compounding by the applicant. The opposing affidavit to the application for summary judgment, which was filed of record on 15 September 2014, contains averments that the respondents have a good *bona fide* defence to the applicant's claim. The respondents deny having filed their plea for dilatory purposes.

The applicant contends that the respondents' objection to its calculation of interest is baseless and without foundation. The applicant reiterates that interest was calculated in accordance with the parties' agreement, clause 8.1 which stipulates that interest was to be charged at the rate of 16% per annum and clause 14.2 which stipulates that a default interest charge rate of 100% over and above the normal rate stipulated in clause 8.1 was to be charged in the event of default. It was submitted, on behalf of the applicant, that the respondents' challenge to the basis of the capitalization of interest is baseless because of the provisions of clause 14.3 of the loan agreement, which reads;-

> "…all interest payable in terms of the loan facility will be calculated on the balance outstanding each day, at the close of business, and the interest outstanding at the end of each month shall be added to the capital and interest thereafter charged on that increased capital".

The applicant contends that it is entitled to charge interest and to compound it monthly, based on clause 14.3. the applicant contends further, again correctly in my view, that a contractual provision to compound interest is enforceable, because there is no moral reason in principle why *mora* interest should not run on unpaid interest that is due and payable. The

applicant relies on *Christie's, The Law of Contract in South Africa*[1] as authority for this proposition. It is now settled in this country, that capitalised interest should not exceed the outstanding capital sum. See *Commercial Bank of Zimbabwe Limited* v *MM Builders & Suppliers Private Limited & Ors* [2], *and G & M Refrigeration & Air Condition Private limited* v *Nyengeterai Nhemachena & Ors* [3]. This principle is known as the *in duplum* rule. The respondents have not raised the defence that the interest that is due and payable exceeds the outstanding capital sum. I accept that the respondents cannot seek to resile from the terms of the loan agreement which bind them to pay compound interest without doing more than just denying liability.

The respondents were duty bound to engage their own accountants to set out evidence before the court to show how or why they aver that the applicant's calculation of interest is erroneous. In the absence of such evidence, the respondent's bare denial of liability to pay interest as calculated by the applicant is insufficient to absolve them of liability to pay (*MM Builders supra, G & M Refrigeration supra).* The respondents ought to have shown in an intelligible manner the extent to which it is alleged that the interest claimed in not due, or payable, in terms of the loan agreement. The respondents' bare denial cannot constitute a *bona fide* defence to an application for summary judgment. Charging interest from the date of the loan was provided for in the loan agreement. The applicant submits, correctly in my view, that there is no provision in the parties' loan agreement that interest could only be charged from the date when the loan became due and payable. The time when interest began to accrue is provided for in clause 14.3. I accept the proposition relied on by the applicant that it is standard banking practice that interest is charged from the date of the loan as opposed to the date of the payment of the loan.

The banker's right to charge interest is based on the custom and usage of banks. See *National Bank of Greece SA* v *Pinios Shipping Co*[4]. It has been held that:-

> 'Ordinarily, the customer is probably aware of the bank's practice of periodically debiting, as money due and payable, interest to an overdrawn current account and if the customer may have been unaware of that practice at the time of his seeking and obtaining overdraft facilities, he must needs have become aware of it where periodical statements of account were rendered to him by

[1] P532 6th ed
[2] 1996 (2) ZLR 420 (H)
[3] HH 68-97
[4] 1990 (2) Lloyd's Rep 225

> the bank, showing that interest had been periodically charged and added to his current capital account. This view has been taken by the courts in England. (Paget The law of banking 8th ed and the cases there referred to)
>
> Another approach, leading to the same result, is that, in the absence of any express agreement on the point, the customer, when seeking and obtaining overdraft facilities from his banker, tacitly agrees to be bound by the practice of the bank in regard to the debiting of accrued but unpaid interest to the capital account…the respondent's practice was to debit unpaid interest to the current account at periodic intervals of approximately one month and, indeed, he testified that that is and has been the common practice of commercial banks in south Africa".

See *Senekal v Trust Bank of Africa Limited*[5], which was quoted with approval in *Deweras Farm private limited & 2 Ors v Zimbabwe banking Corporation Limited*[6].

Clause 9 of the loan agreement clearly provides for the registration of a mortgage bond. The respondents in their papers deny that such a mortgage bond was registered or that its registration was duly authorized. The mortgage bond was registered on the 15th of August 2012. It is a liquid document on which provisional sentence can be sought, and granted. In para 7 of their plea, the respondents admit that the parties agreed on the registration of a mortgage bond in the event of failure to pay the debt. It is common cause that the respondents have failed to pay the debt in one bullet payment by 30 September 2011 as stipulated in clause 3 of the loan agreement. The mortgage bond states that *Velente Ferrao* appeared before the Registrar of Deeds 'he being duly authorized thereto by a Power of Attorney' granted to him by the first respondent who had been 'duly authorized thereto by resolution dated 27th September 2011', of the second respondent. The essential requirements of a mortgage are;-

1. That there be an obligation to repay the borrowed money.
2. That there be an immovable property to which the mortgage attaches.
3. That there be a real right created over the property through the formalities prescribed by law.

> "…the one formality required by our law is to embody the mortgage contract in a special document called a mortgage bond, to be executed before the Registrar of Deeds and registered in the Deeds Registry Office".

See *Banking Law In Zimbabwe*[7]. The inescapable conclusion is that the mortgage bond, whose authenticity the respondents now seek to deny, was properly registered because all the attendant formalities required to formalize it, were complied with.

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[5] 1978 (3) SA 375 (A) @ 384

[6] HH 112-97

[7] A.J. Manase & L. Madhuku

Order 10 of the High Court Rules 1971 provides for the remedy of summary judgment as follows:

> "**ORDER 10**
> SUMMARY JUDGMENT
> ***64. Application for summary judgment***
>
> (1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pretrial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
> (2) A court application in terms of sub rule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action".

The purpose of the relief of summary judgment is to enable a plaintiff with a clear case to obtain swift enforcement of its claim against a defendant who has no real defense against the claim. See *Oak Holdings* v *Chiadzwa SC136/85.* The plaintiff seeking summary judgment must bring itself squarely within the ambit of r 64. See *Shingadia* v *Shingadia* 1966 RLR 285 (G) at 288I-289A, *and Bank of Credit & Commerce Zimbabwe Ltd* v *Jani Investments (Pvt) Ltd* 1983 (2) ZLR 317 (H) at 320F. In other words, the plaintiff's claim must be clear and unassailable as it is set out in the summons and declaration, and verified in the founding affidavit.

> "Accordingly, summary judgment should not be granted when any real difficulty as to matters of law arises, but it has been held that, however difficult the point of law is, once the court is satisfied that it is really unarguable, judgment will be granted." *Shingadia* v *Shingadia* 1966 RLR 285 at 288A-B; 1966 (3) SA 24 (R) at 25-26:"

This passage was cited with approval in *Rheeder* v *Spence* 1977 (2) RLR 263 at 266G; 1978 (1) SA 1041 (R) at 1043. In *Chrismar (Pvt) Ltd* v *Stutchbury* 1973 (1) RLR 277 (GD), BECK J said at 279D:

> "...it is well established that it is only when all the proposed defenses to the plaintiff's claim are clearly unarguable, both in fact and in law that this drastic relief will be afforded to a plaintiff"

The plaintiff's claim in the pleadings (summons, declaration, founding affidavit) must be unanswerable. See *Central Africa Building society* v *Ephison Simbarashe Ndahwi* HH18/10. The founding affidavit must confirm the facts of the case and confirm the cause of action and contain an averment that the respondent has no *bona fide* defense and had entered appearance to defend solely for purposes of delaying the finalization of the matter. *See Chindori-Chininga* v *National Council Negro women* 2001 (2) ZLR 305, *Beresford Land Plan (Pvt) Ltd* v *Urquahart* 1975 (3) SA 615. The respondent must establish that it has a good *prima facie* defense. *See*

Hales v *Doverick Investment (Pvt) Ltd* 1998(2) ZLR 235. The respondent must not be content with vague generalities and conclusory allegations. See *District Bank limited* v *Hoosain and Others* 1984 (4) SA544. In *Mbayiwa* v *Eastern Highlands Motel* SC 139-86 the court stated that:

> "While the Defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defense with sufficient clarity and completeness to enable the court to decide a *bona fide* defense".

In *Jena* v *Nechipote* 1986 ZLR 29(SC) the court stated that, at p 30 D-E:

> "All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that `there is a mere possibility of success'; `he has a plausible case'; there is a real possibility that an injustice may be done if summary judgment is granted".

In the case of *Stanbic Bank Zimbabwe Limited* v *Dickie & Anor* [8] the court said the following:

> "Summary judgment is a procedure that should not lightly be entered upon. It is an extraordinary relief and an applicant must bring himself clearly within the rules. The claim must be substantiated in the founding affidavit. Further evidence is not permitted without leave and then only to traverse new matter raised by the defence which could not reasonably have been anticipated at the time of the application. The plaintiff therefore is putting all his eggs in one basket. …".

The Supreme Court in *Chiadzwa* v *Paulkner* [9] set out the requirements of what an applicant for summary judgment must set out in its founding affidavit, as:

> "(summary judgment), an affidavit must fulfill three requirements:
> 1. It should be made by the plaintiff himself or by any other person who can swear positively to the facts.
> 2. It must verify the cause of action and the amount, if any, claimed.
> 3. It must contain a statement by the deponent that in his belief there is no *bona fide* defence to the action."

The term "*bona fide* defence" has been interpreted by these courts, and the law is settled in regards to its meaning. See *Hales* v *Doverick Investments Private Limited* [10], where it was held, that;-

> "… where a plaintiff applies for summary judgment against the defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good prima facie defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence

[8] 1998 (1) ZLR 205 (HC)
[9] 1991 (2) ZLR 33 (S)
[10] 1998 (2) ZLR 235 (HC)

> with sufficient clarity and in sufficient detail (my underlining for emphasis) to allow the court to decide whether, if these facts are proved at the trial, this will constitute valid defence to the plaintiff's claim. It is not sufficient for the defendant to make vague generalisations or to provide bald and sketchy facts".

It is my view that the applicant has succeeded in setting out the requirements of summary judgment in this matter. The applicant's founding affidavit was sworn to by a person who averred that he who could swear positively to the facts. This averment was not challenged by the respondents, so it is taken as having been admitted by them. The affidavit stated that the cause of action was verified and that the amount claimed was verified. It contained a statement that the respondents did not have a *bona fide* defence to the action. The onus then shifted to the respondents to show that they had a good *prima facie* defence to the action. The respondents ought to have alleged facts which if proved at trial would constitute a defence to the action at trial. Material facts on which the respondents' defence is based ought to have been set out with sufficient clarity and in sufficient detail. In my view the respondent's proposed defences provided bald and sketchy facts which were insufficient to establish their *bona fides*. The respondent's proposed defences were not clearly unarguable in fact and in law.

In order to satisfy the court that they had a good b*ona fide* defence to the applicant's claim, the respondents ought to have specifically challenged the accuracy of the figures supplied by the applicant rather than to make generalized statements that the figures were incorrect. The respondents failed to discharge the onus incumbent on them when they made bald statements about the accuracy of the applicant's figures. It has been held that;-

> "It is dangerous to generalize, and each case differs from others, but nonetheless I think it must be said that bald general allegations of fact may not be enough in every case to show *bona fides.* It might be argued that I do not owe the money is an averment which, if established at the trial, would entitle him to the relief asked for. In most cases, and particularly where there is suspicion that the defence is not *bona fide*, more specific allegations will be equired".See *Songore* v *Olivine Industries Private Limited* [11].

It is common cause that the costs were claimed in terms of clause 14.3 of the loan agreement, and that the applicant is not entitled to collection commission since the debt is contested. None of the defences raised by the respondents can succeed in defeating the claim for summary judgment. This is because none of the defences are plausible, or have been raised with sufficient clarity and completeness to enable the court to determine whether the respondents have raised a *bona fide* defence. The facts raised by the respondents would not entitle them to succeed

[11] 1988 (2) ZLR 210 (S) @ 213F

if raised as defences at trial. The defences which have been raised are needlessly bald, vague and sketchy. See *Kingstones limited* v *L. D. Ineson Private Limited*[12]. The respondents failed to take the court into their confidence. They did not provide sufficient information to enable the court to assess their defence, especially with regards to the question of whether interest had been accurately calculated and compounded. The question of whether interest ought to have been compounded was a question of law which the court settled as being permitted in terms of the loan agreement between the parties and as being in line with standard banking practices. The respondent's defences were mere allegations which they failed to substantiate by solid facts. For there reasons the application for summary judgment should succeed. It be and is hereby ordered that;-

1. Summary judgment in case number HC4701-14 be and is hereby granted in favour of the applicant as against the 1st and 2nd respondents jointly and severally the one paying the other to be absolved for payment of the sum of USD$148 887-67 together with interest thereon at the rate of 15% per annum calculated monthly in advance and compounded monthly in arrears reckoned from 30 May 2014 to the date of payment in full.
2. The property called Stand Lot 27 of Subdivision A of Lot 2B Mount Pleasant lands measuring 4 456 square metres held under deed of transfer Number 5012-2010 dated 8 November 2010 be specially executable.
3. The respondents shall jointly and severally the one paying the other to be absolved pay costs on an attorney client scale.

Wintertons, applicant's legal practitioners
Dube-Banda, Nzarayapenga & partners, respondent's legal practitioners

[12] 2006 (1) ZLR 451 (S) 458 F-H , 459 A