Judgment No. HB 62/07
Case No. HC 2785/03
X Ref HC 3144/03

GLOBAL INSURANCE COMPANY LTD

Versus

TOP TECH COMPUTERS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 14 MARCH 2006 AND 14 JUNE 2007

K I Phulu, for the applicant
D Vundla, for the respondent

Opposed Application

NDOU J: The applicant seeks summary judgment against the respondent. The salient facts of this matter are the following. The applicant issued and served the respondent with summons in case number HC 2785/03 wherein the applicant claims payment of certain sums of money being outstanding premiums and stamp duty arising from a number of what applicant calls "security insurance bonds" which applicant issued to third parties as conditional surety for respondent's bids to such third parties. The term "security insurance bonds" is somehow misleading as it is plain from Annexure B to the applicant's notice of amendment that the applicant bound itself as a surety guarantee to third parties to whom the respondent intended to submit bids for the supply of certain goods. The applicant's liability as surety was conditional on the following in the 90-day period:

(a) if the bidder withdraws its bid during the period of bid validity specified by the bidder on the Bid Form; or

(b) if the bidder, having been notified of the acceptance of its bid by the employer (3rd party) during the period of bid validity.

(i) fails or refuses to execute the Contract Form, if required; or

(ii) fails or refused to furnish the Performance Security, in accordance with the instruction to the bidder.

The crux of the applicant's claim is that "it was a term of the issue of the security insurance bond on behalf of defendant that defendant would on that day pay to plaintiff the premium and stamp duty thereon"

and " defendant has failed to pay any premium and stamp duty due to plaintiff …". The applicant has not pleaded what it means by "on that day" and whether there were separate contracts between it and the respondent relating to the applicant binding itself as surety in terms of the surety bonds in the form of Annexure B. In other words, applicant's case is that it was exposed during the 90-day period to the two risks. The respondent entered appearance to defend the summons and the applicant, in response to the respondent entering appearance to defend, filed this application for summary judgment. The applicant's contention is that the respondent entered appearance to defend solely to delay applicant recovering its lawful claim. The respondent is opposing the application for summary judgment. The respondent's contention is that there is no basis for the applicant's claim because the monies claimed are simply not due and owing and therefore the respondent has a good *prima facie* defence.

It is trite law that the quintessence of the summary judgment remedy is that a plaintiff, whose belief it is that the defendant's defence is not *bona fide* and entered solely for the purpose of delay, should be granted immediate relief without the expense and delay of a trial. As oppositely observed by McDONALD ACJ in *Beresord Land Plan (Pvt) Ltd* v *Urquart* 1975(3) SA 819 (RAD) at 821G-H:

"There are numerous ways in which the legal process for civil cases may be abused by unscrupulous litigants and of those, by far the most common persistent and deleterious in its adverse effect on the administration of justice is the use of such process to delay enforcement of just claims. It is this aspect of the administration of the civil laws which more than any other has tended to bring it into disrepute and there can scarcely be a more important duty imposed upon the courts than to suppress firmly and without delay any manifestation of this too common clause. The temptation for unscrupulous litigants to defend claims strongly to gain time, and in the result the evil, unless it is eliminated at first attempt, tends escalate."

In the case of *Scropton Trading (Pvt) Ltd* v *Khumalo* 1998(2) ZLR 313 (SC) at 313D the Supreme Court said:

"A Plaintiff seeking summary judgment must bring himself squarely within the ambit of rule 64(2) of the High Court Rules, which requires that the cause of action must be verified. It must be substantiated by proof and the supporting affidavit must contain evidence which establishes the facts upon which reliance is placed for the contention that the claim is unimpeachable."

The starting point is considering whether the applicant's claim is unassailable. The special procedure of summary judgment was designed so that a *mala fide* defendant might summarily be denied, except under onerous conditions, the benefit of the fundamental principle of the *audi alteram partem*. So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that this is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law, that this drastic relief will be afforded to a plaintiff – *Rex* v *Rhodian Invstms Trust (Pvt) Ltd* 1957(4) SA 631 (SR); *Shingadia* v *Shingadia* 1966(3) SA 24 (R) and *Christmar (Pvt) Ltd* v *Stutchbury* 1973(1) RLR 277 (G). The cause of action must be verified. It must be substantiated by proof and the supporting affidavits must contain evidence which established the facts upon which

reliance is placed for the contention that the claim is unimpeachable – *Scropton Trading (Pvt) Ltd* v *Khumalo, supra* and *Jena* v *Nechipote* 1986(1) ZLR 29 (S). The applicant must, therefore, bring itself squarely within the ambit of Rule 64(2), *supra*. *In casu*, the applicant's cause of action is not sufficiently pleaded and verified to entitle it relief by way of summary judgment. There is no specific averment as to whether there were separate insurance contracts between the applicant and the respondent, and if so, the full terms of such contracts were in order to verify the applicant's claim for premiums and stamp duty. Premiums are usually paid in respect of insurance contracts and not in respect of surety bonds. The applicant ought to have clearly pleaded the basis for claiming payment of premiums. Further, the applicant merely claims stamp duty without any proof that it actually expended money paying stamp duty to the relevant authorities.

The respondent's contention is that the claim by the applicant is not due and owing. While accepting that the applicant entered into surety contracts with various third parties in respect of bids by the respondent for the tenders by the said third parties, the respondent contends that since the bids at issue were unsuccessful, the applicant has no basis for its claim. To appreciate the applicant's claim and the respondent's defence it is important to understand the exact nature of the contractual relationship between

the parties. The applicant's pleadings are not of assistance in that regard. The following questions remain unanswered in the applicant's pleadings:

(a) is there a contractual relationship between the parties and if so, what is its exact nature? Is it a contract of insurance or a mere surety relationship?

Is the contractual relationship verbal or written?

What are the full terms of the contractual relationship, if any?

All these issues of fact and law are clearly arguable and the applicant should not have proceeded by way of a summary judgment. Accordingly the application for summary judgment is dismissed with costs.

Coghlan & Welsh, applicant's legal practitioners
Dube & Partners, respondent's legal practitioners