

**JUDITH MALAME**

**Versus**

**MARGRET DUTIRO**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 30 AUGUST AND 2 SEPTEMBER 2010

*R Chitere* for the applicant

Defendant in person

Opposed Application

**NDOU J:** This is an application for summary judgment. The respondent is a legal practitioner trading under the style of Dutiro and Partners in Zvishavane. Briefly, the applicant enlisted the services of the respondent to represent her in a matter involving her and her boyfriend. The applicant mandated the respondent to facilitate her separation from her boyfriend and distribution of the property that she had acquired with her boyfriend. The respondent managed to facilitate the amicable resolution of the dispute between the applicant and her boyfriend. Part of the settlement was that the immovable property known as stand number 1109 Eastlea, Zvishavane be valued and the parties' entitlement thereto be shared equally. It was agreed that either party can buy out the other. The property was valued at US\$40 000,00. The applicant decided to pay off her boyfriend's entitlement in the sum of US\$20 000,00. The applicant handed the said amount in cash form to the respondent on 23 September 2009. This amount was trust funds for onward transmission to the applicant's erstwhile boyfriend. This amount, was receipted in respondent's business account instead of the trust account. This money was not banked at all. In the presence of the applicant, the respondent purportedly phoned a Mr Ndlovu of Muzenda and Partners Legal Practitioners i.e. her erstwhile boyfriend's legal practitioners. Applicant was given the impression that the money was on its way to Muzenda and Partners. On 30 September 2009, the applicant coincidentally met the respondent who informed her that there had been a break-in at her offices and the sole item stolen was a cash box containing the sum of US\$20 000,00 that applicant had given her. The respondent also told her that the incident took place during the weekend of 26-27 September 2009 i.e. she had been keeping the sum of US\$20 000,00 in a cash box in her drawer from 23 to 26 September 2009 when it was allegedly stolen. The applicant was naturally not satisfied with the explanation why such a large amount of trust funds was not banked promptly, either that day or on a subsequent day. The respondent could not explain to the applicant her failure to advise her promptly when the money was stolen.

Further, the unlawful entry was allegedly achieved by the use of a duplicate key. Because of the turn of events, the applicant instituted summons under HC 1803/09 for the refund of the US\$20 000,00 plus costs of suit. The respondent entered an appearance to defend whilst at the same time made offers to the applicant to repay the US\$20 000,00.

The applicant did not decline the offers as such but indicated that the instalments offered were negligible and did not reflect any seriousness to offset this large amount . Notwithstanding these offers, to date, almost a year later, the respondent has not repaid a single cent. This did not go down well with the applicant who then filed this application for summary judgment. The respondent opposed this application. In the circumstances, it is trite that the respondent must show that she had a good prima facie defence to the action – *R v Rhodian Investments Trust (Pvt) Ltd* 1957 (4) SA 632 (SR) at 633; *Davis v Terry* 1957 R & N 392 (SR) and *Pitchford Investments (Pvt) Ltd v Muzari* 2005 (1) ZLR 1 (H). Put in another way, the summary judgment may be granted when the applicant's claim is unanswerable and based on a clear cause of action.

*In casu*, the respondent made valiant offers to settle the amount. She made a written acknowledgement of debt. From her plea it is clear that she is not disputing liability but seeks favourable conditions to offset the debt. She was wrong right from the start by not receipting the US\$20 000,00 in the trust account as she was required to. She was wrong in not banking the large amount of cash as she was required to. She did not even bother to inform the applicant promptly of the loss of the money. The applicant, as plaintiff under HC 1803/09 has an unanswerable case against the respondent. In fact in her oral submissions the respondent conceded that she does not have a defence on the merits. All she is doing in this case is pleading poverty and seeking favourable conditions of repayment. She explained her inability to pay and stated that she is relying on others to do so on her behalf. Inability to pay on conditions set out by the applicant is not a defence on the merits. The respondent's appearance to defence is merely to buy time and as such the application for summary judgment is with merit.

Accordingly the application for summary judgment is granted in the following terms:

It is ordered that:

1. Judgment be and is hereby entered for the plaintiff against the defendant.
2. The defendant be and is hereby ordered to refund the sum of US\$20 000,00 to the plaintiff with interest thereon at 5% per annum from 23<sup>rd</sup> September 2009 to date of payment in full.
3. The defendant be and is hereby ordered to pay costs of suit at attorney and client scale.

Judgment No. HB 98/10  
Case No. HC 1803/09

*Chidawanyika, Chitere & Partners*, applicant's legal practitioners