

M.B.C.A. BANK LIMITED

APPLICANT

VERSUS

MERSPIN (PRIVATE) LIMITED

1ST RESPONDENT

AND

DELMA LUPEPE

2ND RESPONDENT

AND

GRACE LUPEPE

3RD RESPONDENT

AND

EDGE INVESTMENTS (PRIVATE) LIMITED

4TH RESPONDENT

IN THE HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 28 OCTOBER 2011 AND 3 NOVEMBER 2011

Mr N. Mazibuko for the applicant

Mr V. Majoko for the respondents

Opposed Matter

MATHONSI J: The applicant instituted proceedings against the four respondents for payment of US\$38 660-05 plus interest, and an order declaring certain immovable property belonging to the fourth respondent but mortgaged to the applicant, specially executable and costs of suit on an attorney and client scale.

The respondents entered appearance to defend and this prompted the applicant to file this summary judgment application alleging that none of the respondents has a bona fide defence and that appearance has been entered for dilatory purposes only. The applicant alleges that during year 2009 it granted the first respondent a revolving loan facility of US\$50 000-00. The second and third Respondents signed guarantees as sureties and co-principal debtors for money advanced to the first Respondent.

As additional security for the debt Stand 23 Bulawayo South Suburban Stands of Stand 374 Bulawayo Township held by the fourth Respondent by Deed of Transfer No. 1479/89 was mortgaged to the applicant. Mortgage Bond Number 42/2009 was registered in favour of the applicant. Of the monies advanced to the first respondent, the amount claimed is outstanding and as at 18 June 2010 the balance stood at US\$34257-61 which debt the first respondent acknowledged on that date and agreed to a payment plan contained in an acknowledgement of debt signed on that date.

The applicant has also submitted a further acknowledgment of debt signed by the second respondent on 18 June 2010 on behalf of the first respondent for the sum of US\$34257-61. A running statement of account has been filed of record together with the in duplum schedule showing the amount owed by the first respondent. It is for these reasons that the applicant claims the respondents have not a bona fide defence.

An opposing affidavit of Stella Moyo, the director of the first respondent, was filed and nothing was filed on behalf of the other three respondents. Stella Moyo claims to be authorised "to depose to this affidavit for the First Respondent in particular and the other respondents in general." No power of attorney given to her by the other respondents has been produced.

Stella Moyo cannot at law purport to represent the other respondents without any written authority to that effect. Clearly therefore there is no opposing papers filed on behalf of the second, third and fourth Respondents. I shall then proceed from the premise that the summary judgment application is opposed only by the first respondent.

For a party to succeed in opposing a summary judgment application, he must allege facts which, if he can succeed in establishing them at the trial, such facts would entitle that party to succeed in its defence *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957(4) SA 631 (SR) at 633 G; *Jena v Nechipote* 1986 (1) ZLR 29(S) at 30D.

A party defending an application for summary judgment must at least disclose his defence and material facts upon which it is based with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence. A defence

which is bald, vague and sketchy will not suffice: *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235(H); *Mining Industry Pension Fund v Banlax and Others* HB 34/11.

In *Hales v Doverick Investments (Pvt) Ltd* (supra) at 238 G and 239 A-B Malaba J (as he then was) quoting *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S 139-86 at page 4-5 said:

“---- while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence (*Maharaj v Barclays National Bank Ltd* 1976(1) SA 418 (A) at 426D--- the statement of material facts (must) be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff’s claim---- if the defence is averred in a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of bona fides----he must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts.”

The problem with the opposing affidavit is that it does not substantiate whatever defence the respondents have. While purporting to answer to not less than 60 pages of the applicant’s claim and annexures, it is legendary by its brevity as its relevant content is less than 2 pages. While appearing to question the interest claimed the opposing affidavit does not state what was agreed and while admitting to owing US\$34257-61, nothing is said about why consent to judgment in that amount has not been filed.

Mr Mazibuko, for the applicant has relied heavily on the case of *Dewera’s Farm (Pvt) Ltd and others v Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368(S) where McNally JA said at 370 B-D;

“Thus, in the present case, had the applicants put forward an authoritative affidavit explaining detailed errors in calculation by the bank, accompanied by a fresh calculation showing the ‘correct’ amount due; and had they then consented to judgment in the admitted amount and asked simply that the issue of the disputed amount go to trial, I, like the learned trial judge, would have been hard put to refuse their request, despite what might well be described as their wilful default. But that is not what happened. The farmers did not recalculate their debt, they did not file an accountant’s affidavit setting out the ‘correct’ amount due; they did not pay that amount or even consent to judgment in that amount.”

The criticism made by the learned appeal judge in *Dewera's Farm (Pvt) Ltd* applies with equal force in the present case. Either because the respondents were being tardy or they were clutching at straws, nothing is contained in the opposing affidavit as would influence me to refer the matter to trial.

The respondents' case is so hopeless that their counsel Mr *Majoko* was left to try and salvage something from the resolution passed by the applicant authorising Patrick Manyumbu to represent the company. Mr *Majoko* argued that because that resolution was defective, it having conflicting dates of the meeting, then the application must fail.

I disagree. Typing errors in the resolution cannot invalidate the representation of the applicant by its "Head of Credit Risk." He has stated that it is in his capacity as such that he is authorised to depose to an affidavit. In my view that should suffice.

I therefore come to the conclusion that the applicant's claim is unanswerable.

Accordingly I make the following order:

- (1) Judgment be and is hereby entered for the Applicant against the First, Second, Third and Fourth Respondents, jointly and severally, the one paying, the others to be absolved, as follows:
 - (a) The respondents shall pay to the Applicant the sum of \$38660-05 together with interest thereon at 30% per annum with effect from the 4th December 2010 to date of full payment.
 - (b) The Respondents shall pay to the Applicant the costs of suit on a legal practitioner and client scale together with collection commission on the above mentioned.
 - (c) It be and is hereby declared that the immovable property belonging to the Fourth Defendant, known as Stand 23 Bulawayo South, suburban stands of Stand 8 of Stand 374 Bulawayo Township measuring 1 487 square metres situate in the

Judgment No. HB 169/11

Case No. HC 1626/11

Xref No. HC 128/11

District of Bulawayo held under Deed of Transfer No. 1479/1989 dated 17th April
1989 is specially executable.

Messrs. Majoko and Majoko, respondents' legal practitioners

Messrs Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners