

**HH 55-02**  
**HC 7807/01**  
 BLESSING MASHEZHA  
 versus  
 PRIME BANK LIMITED

HIGH COURT OF ZIMBABWE  
 HUNGWE J,  
 HARARE, 31 January and 17 April, 2002

**Mr T Magwaliba for the applicant**  
**Advocate H Simpson for the respondent**

**HUNGWE J:** This is an application for summary judgment. On the 16 August, 2000, applicant, (who I will refer to as the plaintiff) issued summons against the respondent (who I will refer to as the Defendant) claiming the following relief:

- "1 (i) Payment of the sum of \$27 500,00 being in respect of cash in lieu of leave;  
 (ii) Payment of sum of \$135 080,00 for damages suffered by the Plaintiff for using his motor vehicle;  
 (iii) The sum of \$48 000,00 being in respect of the subscriptions due to CIMAS;  
 (iv) The sum of \$17 000,00 being in respect of the amount due by the defendant for school fees for the plaintiff's children for the second term for the year 2001.
2. Interest at the rate of 30% per annum with effect from the 25<sup>th</sup> of July 2001 (the presumed date of receipt of the letter of demand) to the date of full payment.
3. Costs of suit."

Defendant entered an appearance to defend and the plaintiff filed an application for summary judgment in terms of Rule 64 of the High Court Rules.

The defendant opposes the application for Summary judgment on a number of grounds. First it contends that the plaintiff only served three months of his six months probationary period. Of the benefits set out in the offer of employment (Annexure A to the Founding Affidavit) the plaintiff was only entitled to receive a monthly salary. The rest only accrued upon defendant's successful completion of the probationary period of six months.

Secondly the letter dated 31 January 2001 addressed to the Headmaster at Guinea

Fowl High School does not indicate or form part of the conditions of service agreed

between the parties as its terms were not incorporated into the subsequent offer, Annexure

"A".

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Thirdly, defendant challenged its liability for all the claims and the basis upon which the figures were calculated.

Fourthly, the claim for compensation being an unliquidated claim for damages, cannot be the subject of a Summary judgment application.

Counsel for the plaintiff moved this Court to grant summary judgment that it has an unimpeachable claim against the defendant and that the defendant has entered an appearance simply for the purpose of delay.

Plaintiff's claim is based on a contract of employment. As I understand the plaintiff's case, that contract is embodied in Annexure "A" to his founding affidavit. That contract is supplemented by letters addressed to him by the defendant, as well as minutes of the Executive Committee of the defendant. In short plaintiff accepts that Annexure "A" is not the full contract of employment. That this must be so is reflected by Annexure "A"'s constant reference to "the Bank's Regulations". The "Bank's Regulations" are not filed of record. The Court was not asked to consider them. The Court was asked to infer from the averments made in the founding affidavit that an unanswerable case in respect of the plaintiff's claims has been made, and that he was entitled to summary judgment forthwith.

**The remedy of summary judgment is a drastic one as it in fact negates a fundamental principle in the administration of justice, *audi alteram partem*.**

***Shingadia v Shingadia* 1966 RLR 285, *Eisenberg's v O.F.S. Textile Distribution (Pty) Ltd* 1949 (3) SA 1047.**

It is a remedy intended to be applied to case of bogus defences and defences that are bad in law. Such a serious inroad and an outright invasion of a basic tenet of the principles of natural justice can only be envisaged where the defendant clearly has no arguable case. It has been said the Defendant need only raise "an arguable case", "a triable issue" in order to defeat such an application as this one.

***In Jena v Nechipote* 1986 (1) ZLR 29 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".

**See also *Rex v Rhodesia Investments Trust (Pvt) Ltd* 1957 R & N, 723 1957 (4)**

**SA 631 (SR) where at p 633 G MURRAY CJ put the defendants' summons at no**

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**more than-**

"-----that the defendant must allege facts which if he can succeed in proving them at the trial, would entitle him to succeed in his defence at the trial".

**The defendant has, to my mind shown that it has a good *prima facie* defence to the claim.**

The Court will have to decide what effect the probationary clause has on the rights and obligations of the parties. It may well be that the Court may find that it was understood by the parties that all the benefits, except the monthly salary, were to flow from the date plaintiff is confirmed as the substantive manager as opposed to during the probationary period.

Besides, the claim for compensation for use of his own motor vehicle by plaintiff cannot by any stretch of the imagination be based on the contract relied on for this suit. Where does it refer to a situation where an employee would be entitled to use his own motor vehicle on defendant's business? Rather it refers to "use of pool car" - item 5 and a car loan as per Bank's Regulations - item 10. Plaintiff contends that after defendant failed to provide a pool car it was agreed that he could use his own motor vehicle and would in time be compensated for this. There is no proof of this agreement on the papers. The existence of the agreement is disputed by the defendant. Defendant goes further. He disputes the method of calculating the sum claimed under this head. Clearly evidence will have to be led to prove this claim. That which the plaintiff has so far placed before the Court is "a far cry from evidence sufficient to prove this claim".

In view of the conclusion I have come to, I need not discuss the sufficiency or otherwise of the evidence on the papers. Suffice it to state that defendant has clearly put forward an arguable case. There are triable issues raised in the defences raised by the Defendant. An injustice will be suffered by the defendant if summary judgment is granted.

In the result the application for summary judgment is dismissed with costs.

***Magwaliba Matutu & Kirira , applicant's legal practitioners***

***Manase & Manase , respondent's legal practitioners***