

NMB BANK LIMITED
versus
WORDHOUSE MULTIMEDIA SERVICES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 7 July 2011 and 19 October 2011

T C Masara, for the applicant
A Mutsiwa, for the respondents

MTSHIYA J: This is an application for summary judgment. The applicant seeks the following relief:

“IT IS ORDERED THAT:

1. Summary judgment in the sum of US\$101 677-93 be and is hereby granted in favour of the applicant and against the respondents.
2. The mortgaged property being certain piece of land situate in the District of Salisbury called Stand 932 Bluffhill Township 17 of Subdivision C of Bluffhill measuring 4000 square metres held by the second respondent under Deed of Transfer No. 4936/2007 dated 18 September 2007 be and is hereby declared specially executable to satisfy the applicant’s claim.”

The application is opposed.

The brief background to the dispute is as follows:

On 4 December 2009 the applicant extended a credit facility to the first respondent. The relevant parts of the agreement read as follows:

“CREDIT FACILITY

We refer to our recent discussions and are pleased to place the under mentioned facility at your disposal subject to the following terms and conditions:

Amount

The total amount available under this composite facility shall not exceed USD 90 000-00 (Ninety Thousand Dollars Only) outstanding at any one time.

Type of facility

A composite working capital facility comprising of the following:

USD 30 000-00 working capital

Guarantee Facility amounting to USD 60 000-00. Making a total composite facility of USD 90 000-00.

OTHER TERMS AND CONDITIONS

5.1 **Limit**

It is understood and agreed that the amounts outstanding to the debit of your current account in respect of overdrafts, bills outstanding drawn and accepted under this facility, call loans, guarantees established and the amounts outstanding to the debit of your offshore finance account, shall together not exceed the amount shown in para 1 above, subject to the provisions of subparagraph.

6.1 **Security//Covenant**

Proposed

6.1.1. First mortgage bond for USD 90 000-00 over a property on stand number 932 Childwar Drive Bluffhill Harare in the name of Terrence Mapiravana.

6.1.2 Unlimited guaranteed by Terrence Mapiravana nad Mercy Magaya.

6.2 **Covenant**

By your acceptance of this facility you undertake that all your company's property and assets present and future will be comprehensively insured at all times against all reasonable insurable risks.

7. **Expiry date**

7.1 This agreement does not bind the bank to lend you any amount of money. This facility and all amounts outstanding hereunder are repayable on demand. In such event we reserve the right to require you to place cash cover with us for all commitments entered into by us on your behalf which have not yet fallen due for payment for whatsoever reason. Unless previously withdrawn by us in writing or extended for a further period, this facility will expire on 31 August 2010.

7.2 Notwithstanding the withdrawal or expiry of this facility for whatsoever reason, the terms and conditions hereof shall continue to apply while any amounts due by you to us (contingently or otherwise) remain unpaid.

8. **Review date**

This facility is due for review on 28 February 2010 and in this connection kindly diarise to provide us with all financial and other information necessary to facilitate the full review of your facility before the expiry date as shown in para 7.”

On the same date the facility was granted, the first respondent passed a resolution accepting the facility. Part of the resolution read as follows:

“IT WAS RESOLVED: that the terms on which NMB Bank Limited has offered the Company credit facilities for USD90 000-00 (Ninety Thousand United States Dollars) as set out in their letter dated 4 December 2009, a copy of which was presented to all Directors, be and is hereby accepted.”

The respondents also provided the securities referred to in paragraphs 6.1.1. and 6.1.1.2 of the agreement quoted above.

The plaintiff states that as at 1 November 2010 the outstanding balance on the loan/facility was US\$101 677-93, attracting interest at 60% per annum.

The respondents dispute the amount owing and state, in part, as follows:

- “3.1 For a start the respondents dispute that the amount outstanding as at 1 November 2010 was US\$101 677-93 as alleged. As a matter of fact, respondents initially obtained US\$30 000-00 and this amount was repaid through daily deposits in the sum of US\$350-00 (three hundred and fifty dollars) until the amount was reduced to about US\$11 000-00.
- 3.2. A glance at the Statement of Account appearing on p 23 – 26 of the application for summary judgment would reveal that the amount outstanding as at 19 October 2010 was US\$2 032-25 (two thousand, thirty two dollars and twenty five cents). The statement also shows that there were several cash deposits made to service the loan.
- 3.3 Respondents have absolutely no knowledge of what the debit entry of US\$98 400-00 is all about. In so far as the respondents are concerned, the loan which remains outstanding is in the range of US\$67 000-00 plus the balance of about US\$11 000-00 from the first US\$30 000-00.
- 3.4 Respondents also query how the interest rate of 60% was arrived at. As far as respondents are concerned the parties agreed to interest at the rate of 35% per annum.”

Apart from conceding that the agreed interest rate was 36%, the applicant persists with its claim as outlined in the summons issued on 26 November 2010 and also maintains that the appearance to defend filed by the respondents on 2 December 2010 was merely filed

for delaying purposes. The applicant states that the respondents have no *bona fide* defence to its claim and hence the application for summary judgment.

In their heads of argument, the respondents take issue with the applicant's founding affidavit. They submit that the founding affidavit does not state the cause of action and that it does not spell out the amount claimed. I am unable to agree with the submission because para 6 of the founding affidavit reads as follows:

- "6. The respondents have no *bona fide* defence to the action in the main cause and have entered appearance to defend for the purpose solely of delay as evidenced by Annexures "A", "B", "C" and "D" attached hereto."

The said annexures refer to:-

- | | | |
|-----|---|----------------------------------------------------------------------|
| "A" | - | Credit Facility Agreement |
| "B" | - | First Mortgage Bond |
| "C" | - | Suretyship for unlimited amount signed by the second Respondent |
| "D" | - | Statement of Account wherein at p 4 the amount claimed is indicated. |

Furthermore, it should be noted that this application is anchored on the summons issued on 26 November 2010 where the particulars of the claim are given. It would be wrong to delink this application from the summons and the declaration thereof which spell out the cause of action. The submission made by the respondents on that issue of cause of action therefore falls away.

The respondents, however, also submit that the amounts owing are not clearly explained in the attachments relied on by the applicant. The respondents, without giving reasons, merely submit that they dispute the applicant's calculations including the rate of interest.

The respondents correctly submit that:

- "7. The remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the court to the defendant. That can only be done if there is no doubt but that the plaintiff has an unanswerable case. If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant. (*Mowschenson & Mowschenson v Merchantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W))."

Equally, the applicant, in its heads of argument, submits as follows:

- “11. It is submitted that in opposing an application for summary judgment all that the respondents need to show is that:
- (a) There is mere possibility of success or
 - (b) They have a plausible case or
 - (c) There is a triable issue or
 - (d) There is a reasonable possibility that an injustice may be done if summary judgment is granted. See *Reid v Gore* 1987 (2) ZLR 130 (H). See also *Time Bank of Zimbabwe Ltd v Culroy Farm (Pvt) Ltd* HH 182-03.
12. It is submitted that the respondents have shown none of the elements mentioned above. All the respondents are doing is making baseless assertion that they are ignorant to their indebtedness to the tune of US101 677-93.
13. Annexure “D” of the applicant’s founding affidavit (statement of account) clearly shows that the amount of US\$98 400-00 was credited into the first respondent’s account on the 29th September 2010. This is the loan that matured a month later which is also shown by a debit entry of the same amount on the 29th of October 2010. Surprisingly this is the amount of money which the respondents are professing ignorance and yet the records are clear”.

An examination of the papers filed in support of the applicant’s case, clearly reveals that the respondents are in receipt of a detailed and self-explanatory statement of account relating to the moneys they borrowed from the applicant. Payments made towards the loan are reflected on the statement and so are the balances. The amount of US\$98 400-00 which the respondents claim to be ignorant of is fully explained in the applicant’s answering affidavit filed on 11 February 2011. In the same affidavit the applicant admits that the interest rate was not 60% per annum but 36% per annum. On their part, the respondents argue that the interest rate was 35% per annum.

Apart from admitting liability and telling the court that “the loan which remains outstanding is in the range of US\$67 000-00 plus the balance of about US\$11 000-00 from the first US\$30 000-00”, the respondents do not find it necessary to back that through a detailed counter statement of account. In the circumstances, my hunt for the respondents’ defence against the granting of summary judgment in favour of the applicant has been in vain. All I find is a move on the part of the respondents to avoid full liability and worse still, where the respondents admit liability they have not acted. The admitted amounts are still outstanding.

At the end of the day all I am being asked to do is to deny the relief sought just because the parties have given different interest rates of 36% and 35%. That's the dispute. On the basis of credibility, I am persuaded to accept the interest rate indicated by the applicant.

Given the clear intentions of the respondents, I have no reason to believe the defendants' story. The applicant has presented a credible story and I find myself disabled from denying it the relief it seeks. The respondents have no sustainable defence to the claim. My view, is that the applicant's case meets the requirements for summary judgment.

I therefore order as follows:

IT IS ORDERED THAT:

1. Summary judgment in the sum of US\$101 677-93 be and is hereby granted in favour of the applicant and against the respondents.
2. The mortgaged property, being a certain piece of land situate in the District of Salisbury called stand 932 Bluffhill Township 17 of Subdivision C of Bluffhill measuring 4000 square metres, held by the second respondent under Deed of Transfer No. 4936/2007 dated 18th September 2007, be and is hereby declared specially executable to satisfy the applicant's claim; and
3. The respondents shall jointly and severally, with one paying the other to be absolved, bear costs of this suit at legal practitioner and client scale.

V S Nyangulu & Associates, applicant's legal practitioners
Donsa-Nkomo & Mutangi Legal Practitioners, respondents' legal practitioners