

GRAEME CHADWICK
versus
JG CONSTRUCTION

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 2 February 2012 and 29 February 2012

Opposed Court Application

A Rutanira, for the applicant
E.R. Samkange, for the respondents

MATHONSI J: After hearing argument in this matter I granted summary judgment and said the reasons or doing so would follow. These are the reasons:

The applicant and one Jacobus Andrew Summerfield are friends of long standing. This did not stop the applicant instituting summons action against the respondent, a company in which Summerfield is Managing Director, for payment of a sum of US\$88 000-00 together with interest at the prescribed rate and attorney and client costs.

In his declaration, the applicant averred that he sold and delivered to the respondent a UD Nissan 15 ton truck for a price of US\$68 000-000 about 2006 or 2008 which amount the respondent failed to pay. He averred further that on 23 August 2010 the respondent acknowledged indebtedness in that sum but still did not pay. Instead, after negotiations, in February 2011 the respondent offered to pay that capital amount together with an additional US\$20 000-00 as fixed interest in recognition of the lengthy delay in payment, hence the claim of US\$88 000-00.

The respondent entered appearance to defend the action prompting the applicant to file this application for summary judgment on the basis that the respondent has not a *bona fide*

defence to the claim and has entered appearance for dilatory purposes. The applicant maintains that no defence can exist in a matter such as the present where the respondent signed an acknowledgement of debt in the capital sum of \$68 000-00 and went on to make an offer in writing to pay fixed interest of \$20 000-00 which offer was also accepted in writing. The acknowledgement of indebtedness, signed by the parties on 23 August 2010 with the respondent represented by the applicant's erstwhile friend Summerfield, has been submitted and it is on the respondent's very own letterhead. It reads in part thus:

"We hereby agree that J G Construction owes Mr Graeme Chadwick US\$68 000-00. Any other acknowledgement of debts between J G Construction, Mr Graeme Chadwick and Mr Jacobus Andries Summerfield are now null and void except for this one."

In addition to that, on 18 February 2011 Summerfield sent a written offer to the applicant, again on the respondent's letterhead, in the following:

"I can offer you 88K as soon as you would like it and in one payment."

This was followed by another dated 25 February 2011 which states;

"I think that you have misunderstood Graham I can only offer you \$88K in total but can arrange for that payment immediately."

The offer was accepted by the applicant by letter dated 17 June 2011 which also explains the route the parties took to arrive at the figure. The applicant wrote:

"I accept the offer of \$88 000 in your email of 18 February 2011 and 21 February 2011 as the full and final amount owed by J.G. Construction (Pvt) Ltd to me for the UD15 ton truck and trailer sold to J G Construction in about 2006 or 2008.

We agree that this amount includes the capital amount of \$68 000-00 contained in the acknowledgement of debt dated 23 August 2010 and remaining \$20 000-00 is the final amount agreed (offered and accepted) as interest on the capital even though you had originally indicated that you would pay me interest at 15% per annum, which is US\$10 200-00 interest per year, or \$30 600-00 interest from 2008 or \$51 000-00 interest from 2006. In the end you only offered me US\$20 000-00. I accept it as the total interest from 2006 or 2008 to date.”

At no time did the respondent refute the contents of the above quoted letter. One can only assume that its silence represented its acquiescence.

In opposing the application the respondent introduced a new element not mentioned anywhere in the deliberations of the parties as appear on the documents I have referred to. While claiming the existence of a dispute as to the amount owing, the respondent stated that the parties were in partnership and that the Nissan UD truck was the applicant’s contribution to the partnership. This, despite the fact that no attempt whatsoever was made to prove the existence of such partnership either in the form of a partnership deed or otherwise or to set out the terms of the alleged partnership.

In fact the respondent’s opposing affidavit is couched in such scant and vague terms as to put its *bona fides* to serious doubt. No meaningful effort was made to explain the acknowledgement of debt and the written offer made by the respondent and those documents remain unchallenged.

Mr Samkange for the respondent half-heartedly tried to argue that the interest claimed violates the *Money Lending and Rates of Interest Act (Cap 14:14)*. He did not develop that argument at all and could not even cite the rate of interest that was applied. I agree with Mr Rutanira for the applicant that whatever interest was agreed by the parties, was a compromise. A compromise is a settlement of disputed obligations. See *R H Chruste, Business Law In Zimbabwe*, 2nd ed. P108. A party sued on a compromise is not entitled to raise defences to the original cause of action. *Moyo & Anor v Intermarket Discount House Ltd* 2008 (I) ZLR 268 (S)

In *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 at 238G and 239A-B MALABA J (as he then was) set out what a respondent in an application for summary judgment must show in order to successfully contest the application, as follows:

“---- 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 not substantiated by solid facts.”

I have already stated that the respondent’s opposing affidavit is couched in vague and sketchy terms. It is needlessly bald and does not proffer any defence against the acknowledgment of indebtedness relied upon by the applicant. In fact the respondent contented itself with arguing extraneously about the existence of a partnership it did not substantiate while ignoring the documents relied upon by the applicant.

I therefore come to the inescapable conclusion that the applicant’s claim is unassailable and that appearance has indeed been entered for purposes of delay. This is a case in which the respondent should have capitulated from the very beginning especially as it has no answer whatsoever to the documents it authored accepting indebtedness. Instead it proceeded to contest the claim almost headlong, in complete defiance of logic. An award of costs on a punitive scale is therefore in order.

Accordingly, it is ordered that:

1. The application for summary judgment is hereby granted.

2. The respondent shall pay to the applicant the sum of US\$88 000 (eighty eight thousand United States Dollars).
3. The respondent shall also pay to the applicant interest on the aforesaid amount at the prescribed rate, being 5% per annum from the 7th of July 2011, being the date of summons, to date of full and final payment.
4. The respondent shall pay costs of suit including costs on a legal practitioner and client scale.

Scanlen & Holderness, applicant's legal practitioners
Venturas & Samkange, respondents' legal practitioners