

MUGANDANI ENTERPRISES (PVT) LTD
T/A MUGA FOODS
versus
TRINPAC (PVT) LTD

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 9 January 2012 & 14 March 2012.

Opposed Application

M. Gapara for the applicant
N. Bvekwa for the respondent

MUTEMA J: This is an application for summary judgment. The basis of the application is that sometime in 2010 respondent was supplied upon request on credit, cake flour by the applicant to its various branches throughout the country. The cake flour was valued at US\$828 518.05. This amount was due and payable on 7 December 2010. Respondent acknowledged its indebtedness by securing US\$700 000.00 via a surety mortgage bond number 1020/2010 by a company called Medworth Properties (Pvt) Ltd. A further US\$218 240.00 was acknowledged via an acknowledgement of debt signed by respondent on 27 October 2010. Given the foregoing, the appearance to defend entered by the respondent is merely a dilatory tactic since respondent has no *bona fide* defence.

The salient aspects of the opposition are as follows:-

1. The applicant's answering affidavit was filed without leave of the court. In the event it must be disregarded.
2. Para 4 of applicant's declaration claims an amount of US\$82 851.00 as capital debt but in the prayer the amount claimed as capital is US\$828.05. it is therefore not clear what the correct amount is.

3. Still on the amounts thrown about in applicant's papers there is attached an alleged acknowledgement of debt for flour worth US\$218 240.00 signed on 27 October 2010 by one Langton Chivasa. There is also a surety mortgage bond for US\$700 000.00 by Medworth Properties (Pvt) Ltd. The two amounts if added yield \$928 240.00 and not either of the capital amounts claimed of \$82 851.00 or \$828 518.05. it is not stated whether respondent made some payments to reduce the debt or applicant abandoned part of the debt. There are no payment terms on the mortgage bond. It simply refers to a facility granted to respondent – supposedly that is where the payment terms are captured. Without spelling out those terms of payment the court has not been shown that the terms had been breached to ground fore closure.
4. The mortgagor bound itself as a surety and co-principal debtor yet that mortgagor was not cited as a party to the proceedings despite it being an interested party.
5. The mortgage bond attached to the application is defective in that it has no identification number or date, it is not signed by the conveyancer, there is no proof that the owner authorized the transaction and does not show the office where the conveyancer appeared.

Now the essence of summary judgment was aptly summed up by Lords Esher and Lopes in *Roberts v Plant* [1895] QB 597 at 603 as follows:

“where..... the Plaintiff can show to the satisfaction of the judge that he has a clear case against the defendant, which the defendant cannot possibly answer, the judge may give the plaintiff leave to enter judgment forthwith without the expense and delay which would be involved in letting the case go on trial in the ordinary way. This is a stringent power to give and therefore the courts have said that its exercise must be strictly watched, in order to see that the plaintiff has brought himself within the scope of the provisions of the order.”

And in the *locus classicus* of *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 426 A Corbert JA held as follows:-

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court that he has a *bona fide* defence

to the claim. Where the defence is based upon facts, in the sense that material alleged by the plaintiff in his summons or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the court enquires into is:

- (a) Whether the defendant has ‘fully’ disclosed the nature and grounds of his defence and the material facts upon which it is founded; and
- (b) Whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.”

In *Jena v Nechipote* 1986 (1) ZLR 29 (S) it was held that 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 his success; he has a plausible defence; there is a triable issue; or there is a reasonable possibility that an injustice may be done if summary judgment is granted.

Now, applying the law to the facts *in casu* in the chronological sequence of defendant’s defence enumerated *supra* order 10 Rule 67 of the High Court Rules, 1971 provides

“No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, Provided that the court may do one or more of the following: -

- (a)
- (b)
- (c) Permit the plaintiff to supplement his affidavit with a further affidavit dealing with either or both of the following:-
 - (i) Any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or
 - (ii) The question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence.”

In light of the foregoing provision it is clear that in an application for summary judgment the plaintiff is limited only to the founding affidavit. Any further affidavit can only

be filed with leave of the court and is restricted to the aspects provided for in proviso (c) (i) or (ii) cited above.

Accordingly, it follows that the defendant's contention that the applicant's answering affidavit which was filed without the leave of the court must be disregarded is quite correct. In the event it is expunged from the record.

Regarding para 4 of the applicant's declaration claiming \$82 851.00 as the capital debt while the prayer has the amount as \$828 518.05, the applicant was supposed to have applied to amend its declaration so that the correct amount it is claiming is reflected. The summons claims \$828 518.05. The applicant's counsel in his oral submissions averred that it is trite law that in such a scenario the court is inclined to consider the figure highlighted in the summons. He, at the same time confessed that he had no authority for that proposition of law. Neither does the court. It is therefore not clear what the correct capital amount applicant is claiming. This, in conjunction with other issues to follow below, amounts to a triable issue and there exists a reasonable possibility that an injustice may be done if summary judgment is granted.

As regards aspect number 3 of respondent's defence *supra* the amounts of \$218 240.00 reflected in the acknowledgment of debt and the \$700 000.00 appearing in the mortgage bond do not assist applicant in establishing the exact capital amount claimed whether it be \$82 851.00 or \$828 518.05. There are no payment terms on the mortgage bond. It simply refers to a facility granted to the respondent. The question that arises is what was that facility? Was it in respect of cake flour or money lent and advanced? Without spelling out the nature of the facility and the terms of payment it is not possible to establish a nexus between the alleged facility and the cake flour claimed to found the cause of action, and whether the payment terms were breached in order to ground foreclosure of the bond. All these constitute a plausible defence as well as a mere possibility of defendant's success.

Regarding aspect number 4 *supra* the mortgage bond clearly states that the mortgagor is a surety and co-principal debtor. In *Muchabaiwa v Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691 (SC) it was pointed out that a person who subscribes to an act of suretyship in solidum and as co-principal debtor is, as far as the creditor is concerned, a surety who has undertaken the obligations of a co-debtor. His obligations are co-equal in extent with those of the principal debtor. See also *Neon and Cold Cathode Illumination v Ephron* 1978 SA 463 at 472 B-C where TROLLIP JA stated that:

“it appears that generally the only consequence (albeit an important one) that flows from a surety also undertaking liability as a co-principal debtor is that *vis-a-vis* the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with principal debtor.” Furthermore, *Caney The Law of Suretyship* 4th ed at 50-51 in regard to the significance of the surety also binding himself as co-principal debtor states “he is liable with him jointly and severally.”

On the strength of the above authorities the mortgagor should have been joined in this suit it being a co-principal debtor who, in the process of being such, had renounced the ordinary benefits normally available to a surety such as those of excussion and division. The respondent’s contention on this score has merit constituting a *bona fide* defence.

The last point relates to the deficiencies of the mortgage bond itself. The applicant argued;

“That the bond is regular and that its ineligibility (*sic*) is owed to the poor photocopying.”

Most probably counsel wanted to say its illegibility is due to poor photocopying. I find that the contentions raised by the respondent in regard to the deficiencies in the bond cannot be dismissed out of hand as mere sophistry. They require closer examination going beyond “poor photocopying.” That bond is annexure “C” to applicant’s founding affidavit and is p(s) 10 to 16 of the record.

That bond has no identification number 1020/2010 that appears in para 5.4 of its founding affidavit. It also has no date or stamp showing when it was registered and which registrar of deeds’ office it was registered. The conveyancer’s signature is not appended to it. A bond’s identification number is governed by practice and common law. S 44 (b) of the Deeds Registries Act, [*Cap 20:05*] provides that a mortgage bond shall be executed in the presence of the registrar by a notary public duly authorized by such owner by power of attorney. *In casu* the bond is not signed by the conveyancer and there is not proof that the owner of the property duly authorized its execution by way of power of attorney. No such

power of attorney is attached. Since the bond does not show which office of the registrar it was registered, coupled with the foregoing defects, it cannot be said that there is a valid mortgage bond that can be used as proof of indebtedness.

In the result I find that the respondent has managed to fully disclose the nature and grounds of its defence and the material facts upon which it is founded thereby establishing a defence which is *bona fide* and good in law. In the event the application is dismissed with costs and respondent is given unconditional leave to defend the action.

G.N Mlotshwa & Company, applicant's legal practitioners
Bvekwa Legal Practice, respondent's legal practitioners