

CHIEDZA CHIKOMO
versus
YISRAEL YEHUDAH

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 28 June 2011 and 8 February 2012

Opposed Application for Summary Judgment

R Nemaramba, for the applicant
E T Moyo, for the respondent

MAVANGIRA J: The following facts are common cause. On 22 January 2010 the parties entered into an agreement in terms of which the applicant lent the sum of US \$9 500-00 to the respondent. It was an express term of the agreement that payment would be made within seven days from the date of lending. The respondent failed to repay the lent amount within the agreed period. He then requested for an extension of time and it was agreed that he would pay back the full amount on or by 30 June 2010. The respondent signed an acknowledgement of debt in which he acknowledged owing the respondent the sum of US \$9 500-00 and also promised to pay the amount owing by or on 30 June 2010.

The following is also stated on the acknowledgment of debt:

“I agree that if I fail for any reason to pay this amount by the agreed date an interest of 25% will be charged.

Legal action will be taken if the money plus interest is not paid within 24 hours from the above agreed date of payment.

I hereby undertake and agree to pay the 25% interest, collection charges as well as costs of suit for the legal practitioner and any other costs incurred by CHIEDZA CHIKOMO if legal action should be taken against me for the recovery of this debt or any other sums due in terms of this acknowledgment of debt.”

The respondent did not make the payment by or on 30 June 2010. The applicants’ legal practitioners wrote and served the respondent with a letter of demand. The respondent did not respond. On 16 July 2010 the applicant, through his legal practitioners, caused

summons to be issued against the respondent claiming payment of the \$9 500-00, interest thereon of 25% of the capital debt, 10% collection commission and legal costs at the legal practitioner and client scale.

The respondent was served with the summons and he entered appearance to defend through his legal practitioners. The applicant has now made this application for summary judgment on the basis that the respondent has no defence to the claim for the capital debt of \$9 500-00.

The respondent opposes the application on the grounds that although he is indebted to the applicant for the capital debt of \$9500-00, the applicant is claiming usurious interest and that as the applicant is not a lending institution or a registered money lender in terms of the Moneylending and Rates of Interest Act, [*Cap 14:14*]. Furthermore, the claim for collection commission is not within the ambit of the Law Society tariffs and has no legal basis. The respondent also contends that as the agreement between the parties is consequently illegal, it would be equitable for costs to be on an ordinary scale.

In *Kingstons Limited v L D Innerson (Pvt) Ltd* SC 8/06 ZIYAMBI JA stated:

“not every defence raised by the defendant will succeed in defeating the plaintiff’s claim for summary judgment. Thus what the defendant must do is to raise a *bona fide* defence - a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. He must allege facts which if established, would entitle him to succeed.

In *casu* the respondent does not deny liability in respect of the principal debt in the sum of US\$ 9500-00. His opposition to the application is principally on the issues of interest, collection charges and costs. These issues are all dealt with in the acknowledgment of debt.

Section 8 of the Money Lending and Rates of Interest Act stipulates as follows:

“8. Maximum rates of interest

(1) No lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest.”

The respondent seeks to find refuge in this provision in his quest to defeat the application. However, s 4 of the Prescribed Rates of Interest Act, [*Cap 8:10*] provides as follows:

“If a debt bears interest and the rate at which interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which

such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise. (emphasis added).

In *casu* the rate at which interest is to be calculated is governed by agreement as reflected in the acknowledgment of debt. The respondent cannot therefore, in my view find any escape from the applicants' claim for 25% interest as this is based on or governed by the agreement between the parties. Furthermore, by virtue of the provisions of s 4 of the Prescribed Rates of Interest Act (*supra*) the acknowledgment of debt cannot, as Miss *Nemaramba* correctly submitted, be said to be tainted with illegality. The applicant's claim for 25% interest is thus justified and the respondent has no valid or *bona fide* defence against it.

The other claims contested by the respondent *in casu* are the claims for collection commission and costs on a legal practitioner and client scale. The applicant's legal practitioner referred the court to case authorities including *Tselentis House (Pvt) Ltd v Southern African P&P House (Pvt) Ltd* 1995(1) ZLR 56 (H) and *SEDCO v Guvheya* 1994 (2) ZLR 311 (H) in support of the proposition that where a party agrees to pay collection commission, and legal costs, as in this case, the court should grant an order for the same. In *Scotfin Ltd v Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 SMITH and GILLESPIE JJ stated at 582 B:

“As is well known, costs are awarded at this higher rate only in exceptional circumstances. They may, however, be awarded when there is agreement to such an effect. The purpose of such agreement, quite obviously, is the same as the intention behind an agreement that the debtor will be liable to reimburse his creditor collection commission. It is to ensure that the creditor does not suffer the inevitable loss which will be incurred as a result of the taxation of a party and party bill, even though he recovers his costs.”

They proceed at 584 F-G:

“The appropriate form of order for such relief moved in the High Court is accordingly the following, where there is an agreement between the creditor and debtor that collection commission and costs on the higher scale may be recovered:

‘Judgment for the plaintiff in the sum of \$x together with interest at the prescribed rate, presently y% per annum from until the amount is paid in full and collection commission thereon calculated in accordance with by-law 70 of the Law Society of Zimbabwe by-Laws, 1982, and costs on the legal practitioner and client scale to the extent such costs are permitted in proviso (iii) to by-law 70(2).

Where there is no agreement ...”

In the acknowledgment of debt in *casu* the respondent agreed *inter alia* that should legal action be taken against him for the recovery of the debt, he would pay “collection charges as well as costs of suit for the legal practitioner and any other costs incurred” by the applicant. There is no agreement to pay costs on the legal practitioner and client scale. The statement merely states “costs of suit for the legal practitioner”. I am not persuaded it is necessary to exercise discretion and award costs on the legal practitioner and client scale as urged by the applicants’ legal practitioner. Costs will be awarded on the ordinary scale. The respondent also agreed to pay collection charges. I will be guided by the formulation in the *Scotfin Ltd v Ngomahuru* case at 584 F-G (*supra*) in granting the relief sought by the applicant in this respect.

The respondent has failed to raise a *bona* defence to the applicant’s claim. He has not alleged any facts which if established, would entitle him to succeed. His lack of *bona fides* is also shown by his non payment of even the capital debt only, for which he does not dispute liability.

In the circumstances it appears to me that there is no impediment to the granting of the order sought by the applicant with the modifications indicated above. It is therefore ordered as follows:

IT IS ORDERED:

1. That the respondent shall pay to the applicant the sum of US \$9 500-00 together with 25% interest therein; collection commission therein calculated in accordance with by-law 70 of the Law Society of Zimbabwe By-Laws, 1982, and costs of suit.

Chihambakwe Mutizwa & Partners, applicants’ legal practitioners.
Scanlen & Holderness, respondent’s legal practitioners.