AFRICAN BANKING CORPORATION OF ZIMBABWE
LIMITED t/a BANCABC
versus
PWC MOTORS (PVT) LTD
and
PETER MARE
and
WONDER MARE
and
CHARLES MARE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 03 APRIL 2013 AND 08 MAY 2013

*I.G. Musimbe*, for the applicant
*R. Goba*, for the respondents

**Opposed Application**

MATHONSI J: This summary judgment application graphically illustrates that a trend is fast developing among business people in this country to borrow huge sums of money from financial institutions and when the time to pay comes, to pay as little as possible or better still, not to pay at all. A pattern is manifesting itself where business people will stop at nothing in avoiding to pay legitimate claims and in the process play havoc to investor confidence.

BARTLETT J put it very succinctly in *Industrial Equity Ltd v Walker* 1996 (1) ZLR 269 (H) 308C when he said:-

> "Things that go round come round. Walker has had a merry dance. But he would, to my mind, be well advised to realise that the music has stopped and the time has come to pay the piper. Although with Walker's determination to divest himself of all things executable, I fear that the dance is not yet over – and that it won't be long before the pipes are calling again and the last waltz begins."

On 19 July 2011 the applicant extended an overdraft facility to the first respondent which was signed for by the second and third respondents in terms of which the first respondent would be advanced a sum not exceeding US$50 000-00. The second, third and fourth respondents

signed unlimited guarantees binding themselves as sureties *in solidium* for the due and punctual repayment on demand of all sums of money due by the first respondent.

Although money was drawn in terms of the facility to the tune of $51 500,45 the first respondent failed to service it resulting in the applicant terminating the facility and demanding immediate payment of the amount due. In response to the demand the first respondent, again represented by the second, third and fourth respondents, wrote 2 letters acknowledging indebtedness. In the letter of 5 March 2012 they stated:

> "REF: BancABC FACILITY NUMBER A13766 FOR USD 50 000.00
>
> We acknowledge the above facility and would want you to note that P.W.C. Motors p/l is willing to and able to pay US$1 000.00 (one thousand United state dollars) per month towards the balance that we owe BancABC."

The respondent wrote another letter acknowledging the debt on 12 March 2012. They stated as follows:-

> "REF: BancABC FACILITY NUMBER A13766 FOR USD 50 000.00
>
> We acknowledge the above facility and would like to assure you of our commitment to pay it off as urgently as we can. Our Managing director has put up his residential property (with deeds) for sale and proceeds from that will be used to offset our debt with the bank. We are very keen to maintain our business with BancABC and we will channel all our transactions through them. We thank them for their continued support and we apologise for our account's non-performance but we trust that they will be patient with us regarding this matter.
>
> Yours faithfully
>
> P. Mare – Managing Director
> W. Mare – Director
> C. Mare – Director"

It would appear that the respondents underwent some dramatic metamorphosis from the position proclaimed in the above correspondence because when the applicant issued summons claiming the outstanding sum of $47 460-00, they promptly entered appearance to defend and requested a whole array of further particulars.

Believing that the respondents did not have a *bona fide* defence to the claim in light of the provisions of the facility document they signed and the obviously unequivocal

acknowledgement of indebtedness contained in the letters I have cited above, the applicant filed this court application for summary judgment.

In his founding affidavit, Luckson Pfukwa, the Head of Credit of the applicant stated that the facts are within his personal knowledge and that he is duly authorised to depose to the affidavit on behalf of the applicant. He confirmed the cause of action as being the overdraft facility and the mortgage bond registered against stand 5246 Mutare Township. The application is opposed by the respondents. They took issue with the applicant's failure to attach a resolution showing that Luckson Pfukwa is authorised to represent the applicant. On the merits, they insisted that there are material disputes of fact which should be determined at the trial. They demanded that the applicant must prove the actual amount due, the legality of the interest claimed and also justify the fees levied.

The respondents also insisted that certain amounts of money were paid to the applicant which were not taken into account in arriving at the amount claimed. They attached receipts totalling $830-00 for payments of $100-00 instalments made between 2 March and 31 March 2012.

At the hearing of the application Mr Goba, for the respondents took a point *in limine* that the deponent of the founding affidavit has not shown that he has authority to represent the applicant. He submitted that Luckson Pfukwa does not have *locus standi* to bring the action.

A summary judgment application is made in terms of Rule 64 of the High Court of Zimbabwe Rules, 1971. The requirement for a supporting affidavit is contained in subrule (2) of Rule 64 which provides;

> " A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief, there is no *bona fide* defence to the action."

To my mind, the affidavit of Pfukwa meets all the requirements of Rule 64 and he fell within the category of persons who could swear positively to the facts; *Bubye Minerals (Pvt) Ltd & Anor v Rani International Ltd* 2007 (1) ZLR 22 (S) 25B.

I am aware that there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution; *South Africa*

*Milling Company (Pvt) Ltd v Reddy 1980(3) SA 431; South African Allied Workers Union & Others v De Klerk N.O & Others* 1990 (3) SA 425.

However, it occurs to me that that form of proof is not necessary in every case as each case must be considered on its own merits. *Mall (Cape) (Pvt) Ltd v Merino KO-Oprasie Bpk* 1957 (2) SA 345 ( C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person.

To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary. Where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application. I therefore reject the point *in limine*.

On the merits the applicant is standing on firm ground having produced the facility document signed by the respondents and the mortgage bond which is, itself, an acknowledgement of debt. In addition, letters written by the respondents admitting liability have been produced.

In order to succeed in defeating a summary judgment application the respondents must disclose a defence and material facts upon which that defence is based with sufficient clarity and completeness so as to persuade the court that if proved at the trial such facts will constitute a defence to the claim: *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) 239 A-B.

As stated by ZIYAMBI JA in *Kingstons Ltd v L.D. Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 458 F-H and 459A:

> "Not every defence raised by a defendant will succeed in defeating a 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.' See *Jena v Nechipore* 1986 (1) ZLR 29(S); *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd S* – 139-86; *Rex v Rhodian Investments Trust ( Pvt) Ltd,* 1975 R & N 723 (SR).
>
> If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides.* See *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D-E.

> The defendant 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 and conclusory allegations not substantiated by solid facts' see *District Bank Ltd v Hoosain & Others* 1984 (4) SA 544 ( C) at 547G-H; *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* – supra*; Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H)".

The respondents do not even begin to satisfy the criteria set out above. All that they have done in the opposing affidavit of the second respondent, is place in issue, without more, the actual amount claimed and indeed the penalty fees. Yet all the claims have been supported by documentation including the facility document and the *in duplum* schedule showing how the amount claimed is arrived at.

The respondents signed an agreement allowing the applicant to charge the interest that is being claimed. Without disputing the terms of the instrument of debt, the respondents want the interest rate to be referred to trial. They do not show why they should not be bound by what they agreed. These are the same respondents who wrote 2 letters acknowledging the debt and asking for time to pay. In my view, no defence whatsoever has been shown by the respondents.

Mr Musimbe for the applicant made reference to the remarks of ROBINSON J in *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) 37, which I subscribe to, where the learned Judge said:-

> " Businessmen beware. If you fail to honour your contracts then don't start crying if, because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract."

I find it utterly deplorable that business people are very quick to receive money from banks undertaking to repay on certain terms. When they have expended the money and enjoyed the benefits they cry foul when the lender demands its dues. We cannot allow a situation where business people grab loans and then refuse to pay. As they say, the time to pay the piper has come. I have taken into account the sum of $830-00 paid after computation of the debt. In the result I make the following order; that

1. Summary judgment be and is hereby entered in favour of the applicant against the respondents, jointly and severally, the one paying the others to be absolved, in the following;-
    a) The sum of US$46 630-00 being the balance on the overdraft facility entered into between the parties on 19 July 2011.

b) Interest on the sum of US$46 630-00 at the rate of 44% per annum from 5 June 2012, the date of service of summons to date of payment.

c) Costs of suit on the legal practitioner and client scale together with collection commission to the extent that such commission is permissible in terms of the Law Society of Zimbabwe By Laws.

2. The immovable property known as stand 5246 Mutare Township situate in the District of Umtali registered in the name of the first respondent be and is hereby declared specially executable.

*Bere Brothers*, applicant's legal practitioners

*Makombe & Associates*, respondent's legal practitioners