

AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
versus
OSWELL ANESU MAGURIRA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 25 June 2019 & 3 July 2019

Opposed application-summary judgment

T Mukweshu, for the applicant
T Duma, for the respondent

TAGU J: On 23 April 2014 and at Harare the plaintiff (applicant) and defendant (respondent) entered into an agreement in terms of which applicant extended to the respondent a mortgage finance facility in the sum of US\$41 509.00. As security for the loan the respondent registered a mortgage bond in favour of applicant against a certain piece of land situate in the District of Selukwe called Stand 468 Selukwe Township under Deed of transfer number 1052/2014. In breach of the agreement between the parties respondent failed to fully repay the loan facility within the period stipulated in the facility. Instead of making regular monthly payments, the respondent paid lump sums at irregular intervals such that as at September 2018 the balance outstanding on respondent's account was the sum of US\$33 405.29 as *per* induplum schedule shows. Despite several demands the respondent has failed to pay the full sum demanded.

On 2 October 2018 the applicant (plaintiff) caused summons to be issued claiming payment of US\$33 405.29 (thirty three thousand, four hundred and five dollars and twenty nine cents) being the capital debt owed to the applicant by respondent for a mortgage loan facility advanced to him, together with interest and costs of suit on an attorney–client scale as well as

collection commission. An appearance to defend was entered by the respondent on 12 October 2015. At the expiry of the *dies induciae*, the applicant served a Notice of Intention to bar on the respondent, which was responded to by the respondent's plea filed by him on 8 November 2018. In his plea he primarily denied any allegation of indebtedness and claimed that liability was with his former employer who he blamed for his default. Feeling that the respondent does not have a valid defence at law, the applicant filed the present application for a summary judgment.

This application mounted by the applicant for Summary Judgment has been done in terms of Order 10 r 64 of the High Court Rules which reads:

“(1) Where the respondent has entered appearance to a summons, the applicant may, at any time before a pretrial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.”

It is trite in our law that the objective of this remedy is to enable an applicant with a clear case, to obtain a swift enforcement of its claim against a respondent who the applicant has a defence that is, if any, without substance in law and in fact. See *Mbundire & Anor v Dalso Properties (Pvt) Ltd & Others* [2017] ZWHHC 15; *JetZone Consultancy (Pvt) Ltd v Twenty Third Century Systems (Pvt) Ltd*, [2017] ZWHHC 16; *Zimbabwe Phosphates Industries (Pvt) Ltd v Windmill (Pvt) Ltd* [2015] ZWHHC 300; and *Pitchford Investments (Pvt) Ltd v Muzari* 2005 (1) ZLR 1 (H).

In order to successfully resist an application for summary judgment a respondent in his opposing affidavit would be required to fully disclose the nature and grounds of his defence as well as the material facts on which it is based in a way that would satisfy the court that he has good prima facie defence to the action; see *De Villiers v Human and Another* [2016] ZAECGHC 85. However, not every defence raised by a respondent will succeed in defeating an applicant's claim. See *Bulawayo City Council v Trishul Properties* [2015] ZWBHC 04.

In *casu*, it is not in dispute that the respondent entered into a written agreement in 2014 in terms of which the applicant extended a loan facility in the sum of US\$41 509.00. It is not in dispute that the respondent accessed and used the funds in question. It is not in dispute that the respondent never made monthly repayments but lump sum payments after requests were made by the applicant. It is not in dispute that as at the time the summons was issued up to today the respondent still owes the applicant an amount of US\$33 405.29 excluding interests and other

charges. The respondent set out various objections to this application in his Opposing Affidavit which primarily revolved around justifying his defaults as well as reasons why he should be allowed to evade any liability to the applicant's in terms of the facility agreement in question such as not having been place in mora.

However, as an example, on or about 11 September 2017 the respondent was served with a letter of demand placing him in mora which consequently eroded the 120 month lifespan of the facility and made it immediately and entirely payable. In my view there are no triable issues in this case hence the application for summary judgment has merit. It is therefore granted.

IT IS ORDERED THAT

- 1) Summary Judgment be and is hereby granted in favor of the Applicant as follows-
 - i. Payment of US\$33 405.29 being the capital debt;
 - ii. Payment of interest at the prescribed rate calculated from September 2018 to date of full and final payment;
 - iii. An order that the property situated in the District of Selukwe called Stand 468 Selukwe Township under Deed of Transfer number 1052/2014 be declared specially executable;
 - iv. Payment of costs of suit on an attorney–client scale.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Kwenda & Chagwiza, respondent's legal practitioners