HB 20/19
HC 1808/18

ARENEL (PVT) LTD

Versus

FORM PAC (PVT) LTD

And

ROLAND BAKER

And

CARLINGTON CHOMU

And

JAYESH DESAI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 18 JANUARY & 14 FEBRUARY 2019

Opposed Application – Summary judgment

S. Huni for the applicant
N. Mazibuko for the respondents

MAKONESE J: This is a court application for summary judgment in action proceedings commenced by the applicant against the respondents under case number HC 996/17. The applicant alleges that it sues on a liquid document and claims against the respondents jointly and severally, the one paying the other to be absolved. Applicant seeks payment of a sum of US$45 057,54 being the balance based on an acknowledgment of debt. The total amount allegedly due was originally a sum of US$60 770,00 in respect of a loan advanced by the applicant to 1st respondent. The 2nd, 3rd and 4th respondents jointly signed a document referred to as an "**individual guaranty".**

The application for summary judgment is being opposed by the respondents who contend that the application is based on a cause of action which is not pleaded in the applicant's summons. A close analysis of the application for summary judgment clearly shows that the

application is wholly premised on an acknowledgment of debt allegedly executed by respondents. The cause of action in the summons is based on a loan agreement. In its summary judgment application, the applicant has produced proof of an acknowledgment of debt and not a loan agreement.

It is trite that a summary judgment application must be based squarely on the averments and cause of action in the summons. It follows therefore, that the founding affidavit in a summary judgment application must be rooted in the cause of action as declared in the summons. A founding affidavit that bases its action on a different cause of action to that pleaded is of no use in proving the applicant's claims. Such a founding affidavit not only contradicts the cause of action but does not provide a basis for granting summary judgment.

It is my view, that the applicant's founding affidavit is fatally defective and cannot give rise to summary judgment being entered against the respondent.

Background

The factual background to the application for summary judgment is this. On the 7th April 2017 the applicant commenced action against the respondents in an action filed under case number HC 996/17. In the action proceedings applicant claimed the sum of US$45 057,54 being the balance outstanding on an acknowledgment of debt in the sum of US$60 770,00 being a loan advanced by the applicant to 1st respondent and in respect of which 2nd, 3rd and 4th respondents jointly signed an "**Individual Guaranty".** The respondents defended the matter indicating that there was no such loan agreement. The applicant has launched this application for summary judgment on the basis of the acknowledgment of debt.

The law

The law is very clear. Summary judgment is a drastic remedy which should be granted only if the applicant has an unassailable case or conversely where the respondents have no arguable case before the court.

See *Chrismar (Pvt) Ltd* v *Stutchbury* 1973 (1) 277 (G) at page 279 B, where BECK J stated as follows:

> *"Because I am satisfied that this matter which the defendants should without question be allowed to defend unconditionally it would be inappropriate for me to embark at this stage upon a discussion of the evidence and of the possible inferences and conclusions of law to be drawn therefrom. The special procedure for summary judgment was conceived so that a mala fide defendant might summarily be denied except under onerous conditions, the benefit of the audi alteram partem. So extraordinary an invasion of a basic tenet of natural justice will not be lightly resorted to, and it is well established that only where on the proposed defences to the plaintiff's claim can clearly unargueable, both in fact and in law, that the drastic relief will be afforded to a plaintiff. See Shingadia v Shingadia 1963 (3) SA 24 (R.), and the authorities then cited …"*

It has been settled, throughout the authorities that were there is a mere possibility of success exists, leave to defend has to be given to the defendant as he is required to show a probability of success, and only a prima facie defence.

See also *Davies* v *Terry* 1957 R & N 392, 1957 (4) SA 98 (SR)

Applying the law to the facts

Although the applicant's summons referred to an acknowledgment of debt, it does not in fact base its cause of action on the acknowledgement of debt, but rather, on a loan agreement between the parties. The particulars in the declaration detail the alleged terms of the loan agreement between the parties. What is curious in this matter, is that instead of adducing evidence of proof of the loan adverted to in the applicant's summons and particulars of claim, in its founding affidavit, the applicant refers to the acknowledgment of debt, which is a completely different cause of action. In any event, the acknowledgment of debt does not state that it is itself a loan agreement, or that the cause of action of the acknowledgment of debt is the loan of some money owed by the respondents. In effect, therefore, the applicant has not adduced a liquid document evincing a loan agreement as claimed in the summons but rather has produced an acknowledgment of debt whose basis is not established on the papers filed by the applicant.

The respondents aver in their defence that there was in fact no loan agreement but rather a joint venture in respect of which Mr Lepar, a director of the applicant, injected monies and that such monies were now due as a result of the joint venture agreement collapsing. The respondent gave extensive details about this failed joint venture involving the parties, including the exact amounts contributed by Mr Lepar and the terms of repayment of Mr Lepar's contribution into the joint venture agreement including the deduction of the cost of the plastic bottles which were to be supplied to the applicant by 1st respondent.

In its founding affidavit, the applicant is completely silent as regards the respondent's defence as pleaded in the plea and counter claim. The applicant says absolutely nothing about the averments regarding the joint venture and the damages allegedly suffered by respondents. The respondents" defence is clearly detailed and called for a direct response from the applicant. The defence proffered by the respondents is neither vague nor fanciful and if proved constitutes a complete defence. Further, the applicant has not addressed the issue of the rate of interest respondents claim is contrary to the Money Lending and Rates of Interest Act (Chapter 14:14).

Disposition

From the aforegoing, it is clear that the respondents have shown that they have a *bona fide* defence to the claim. The respondents' counter claim is not vexatious and applicant has not established that it has an unanswerable case against the respondents. For that reason, the application for summary judgment cannot be sustained on the papers before the court.

Accordingly, and in the result, the application for summary judgment is dismissed with costs.

Messrs Coghlan & Welsh, applicant's legal practitioners

Messrs Harvey & Granger co. Calderwood, Bryce Hendrie & Partners, respondents' legal practitioners