MARJORIE FADZISO MUTEMERERWA
versus
SHINGIRAI ALBERT MUNYEZA
and
WILMA MUNYEZA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 22 March and 19 July, 2023

Opposed Matter

P Seda, for the plaintiff
M D Muchada, for the respondents

MANGOTA J: I heard this case on 22 March, 2023. I dismissed the plaintiff's prayer with costs and directed the parties to proceed in terms of r 14 (14) of the rules of court.

On the day that I rendered my decision to the matter, the plaintiff's legal practitioners wrote to the registrar of this court requesting written reasons for my decision to, as they put it, assist their client. These are they:

On 13 March, 2023 the plaintiff issued provisional sentence summons against the defendants, jointly and severally the one paying the other to be absolved, for payment to her of the total sum of USD100 000 together with interest at the prescribed rate calculated from 1 February, 2023 to the date of full payment together with legal costs which are at attorney and client scale. She based her claim on two acknowledgements of debt which the defendants signed on 22 January, and 27 February, 2023 in terms of which the latter agreed to repay to her on 31 January 2023 the capital sum of USD85 000 and interest of USD15 000 making a total of USD100 000.

The provisional sentence summons was preceded by a letter of demand which the plaintiff's legal practitioners wrote to the defendants on 3 March, 2023. They acknowledged

receipt of the same on 4 March, 2023. The first defendant who received the letter wrote on it the words 'All rights reserved' whatever that was/is meant to convey to the reader.

The defendants filed their notice of opposition to the provisional sentence summons on 31 March, 2023. They denied having entered into acknowledgements of debt with the plaintiff on 1 January and 27 February, 2023. They insisted that the acknowledgements of debt were not attached to the provisional sentence summons. They claimed that the acknowledgements of debt were not enforceable. They stated that the acknowledgements of debt which violated s 11 of the Exchange Control Regulations were not valid and were, therefore, not liquid documents. They alleged that the documents direct them-Zimbabwean residents-to pay the loan into the plaintiff's Botswana account. The plaintiff, they averred, did not show that exchange control approval had, at the time of signing the agreements, free funds in accounts which are outside Zimbabwe. They insisted that, when dealing with payments outside Zimbabwe, it was impermissible to agree to pay without first obtaining authority of the exchange control authority. The court, they claimed, will not grant an order which has the effect of enforcing an illegality. They insisted that the claim of the plaintiff was unsustainable. They moved me to dismiss the same with costs.

Rule 14 upon which the provisional sentence summons rests is relevant. It allows a person who holds a valid acknowledgement of debt which, in common legal parlance, is called a liquid document to cause a summons to be issued claiming provisional sentence on the said document. It reads:

> "14 (1) Where the plaintiff is the holder of a valid acknowledgement of debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document."

The Rule, unfortunately for the parties, does not state clearly the meaning and import of what it refers to as a valid acknowledgement of debt. Nor does it define the meaning of the phrase 'liquid document'. It leaves those two matters to case authorities. What it does bring out, however, is that the acknowledgement of debt may or may not be valid. Its validity does, in my view, depend upon the circumstances of the nature of each document which the plaintiff who sues on the basis of provisional sentence summons places reliance upon.

Sibanda v *Mashingaaidze*, HH 56/2011 defines liquid document to mean any clear, unequivocal and unambiguous promise to pay a debt. The words 'unequivocal' and 'unambigous' presuppose that the document may, or may not, be equivocal and/or ambiguous. *First Merchant*

Bank of Zimbabwe Ltd v *Forbes Investments* (*Pvt*) *Ltd & Anor*, 2000 (2) ZLR 221 (S) lays down three considerations which define the meaning and import of the phrase 'a valid acknowledgement of debt'. These are that:

i) the acknowledgement must have been made by the debtor;
ii) there must be express or tacit acknowledgement of the existence of liability –and
iii) the acknowledgement must have been made in favour of the creditor or his agent.

Whilst no one quarrels with the requirements as set out in the above-cited case authority, the catch-phrase centers on the validity or otherwise of the document which constitutes the acknowledgement of debt or, as it is often referred to, the liquid document. A liquid document which, for instance, is tainted with illegality cannot, in my view, be regarded as a valid document. It cannot because it is unenforceable. It is, in other words, objectively impossible of performance by the parties who appended their signatures to it.

Van Der Merwe, Van Huyssteen, Reinecke and Lubbe discuss the concept of possibility of performance of a contract. The learned authors discuss the same extensively in their *Contract, General Principles, 4th edition,* (*Juta*) pp 160-163. They distinguish performance which is subjectively impossible from performance which is objectively impossible. They assert that one of the requirements for the creation of a contract is that performance agreed upon must be objectively possible of performance when the agreement is concluded. They state further that an agreement will not create obligations if performance is objectively impossible. They define objective impossibility to refer to a general inability to perform. By this they mean that, in the eyes of the law, no one is able to render the performance. They give, as an example, that where performance is prohibited by law, the inability to perform can be treated as an instance of objective impossibility or of illegality: *Coombs* v *Muller*, 1913 EDL 430; *Wilson* v *Smith*, 1956 (1) SA 393 (W).

The acknowledgement of debt which the plaintiff and the defendants signed is, on the face of it, a contract. It, accordingly, has to meet all the requirements of the contract, amongst them, legality of the same. The question which, therefore, begs the answer is whether or not the same is, in terms of the law, valid. My view is that it is not. It is not because it violates s 11 of the Exchange Control Regulations. These place an *onus* on the contracting parties to observe and comply with

their requirements. Neither the plaintiff nor the defendants saw the need to think of the regulations at the time that they entered into the acknowledgement of debt which, in essence, is a contract as between them. None of them did, in concrete terms, see the need to obtain the approval of the exchange control authority to pay money to each other outside Zimbabwe. Because the approval was not sought and/or obtained, their contract cannot be enforced.

Section 11 of the Exchange Control Regulations which is relevant to the case of the parties is couched in peremptory language. It reads:

> "…….unless otherwise authorised by the Exchange Control Authority, no Zimbabwean resident shall-
> a) Make any payment outside Zimbabwe; or
> b) Incur any obligation to make payment outside Zimbabwe."

Macpe (Pvt) Ltd v *Executrix, Estate Forester*, 1991 (1) ZLR 315 (S) at 320 B-D discusses the meaning and import of the above-quoted section of the exchange control regulations. The court remarked that:

> "The essential point to be noted is that there is a clear difference between section 7 (now section 10) and section 8 (now section 11). The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay.
>
> In other words, when one is concerned with payment inside Zimbabwe, it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments outside Zimbabwe, it is unlawful to enter into the agreement to pay, without first obtaining the authority of the Minister whose powers have been delegated to the Reserve Bank."

In casu, the plaintiff should have moved to protect her position as a prudent lender of money. She would, as a prudent lender, have insisted that the defendants should proceed to obtain the necessary exchange control approval before she advanced any money to them. That way her interests would have been safeguarded in a water-tight manner. She would not have opened herself up to the defence of the defendants. These were, after all, in need of the money. They would, therefore, have wasted no time to comply with the law as an inducement on them to secure the loan from her. Her assumption that the money would find its way into her pocket outside the exchange control regulations renders the acknowledgement of debt which she signed with the defendants nugatory. She, in other words, should not have left anything to chance. She is, therefore, to blame as much as the defendants are in the observed set of circumstances.

The defendants, on their part, should have honed up to her. They should have told her that they would repay the loan which she advanced to them from within or outside Zimbabwe. They remained silent on this issue which was known to them and they, in the process, allowed the plaintiff to part with her hard-earned money in circumstances where they knew that they would raise the defence which they are now placing reliance upon. They, no doubt, took advantage of an unsuspecting lender from whom they took the money without complying with s 11 (b) of the Exchange Control Regulations. They are more to blame for their conduct than the plaintiff is.

The Exchange Control Regulations do not define the words 'Zimbabwean Resident. That is, however, left to be understood. Zimbabwean resident would translate to mean an *incola* of Zimbabwe as opposed to a *peregrinu*s who is in Zimbabwe. Both the plaintiff and the defendants are, it would appear, *incolae* of Zimbabwe. The exchange control regulations, therefore, apply to them both with equal force. They were, and are, duty-bound to live within, and not without, the law. The acknowledgement of debt which they signed between them remains very difficult, if not impossible, to enforce. It, as the defendants correctly put it, offends the exchange control regulations. The court has no equitable jurisdiction to grant relief to a plaintiff who seeks to enforce a contract which is prohibited by law. The court is, in fact, bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties: *York Estates Ltd* v *Wareham*, 1950 (1) SA 125 at 128; *Matthews* v *Rabinowitz*, 1948 (2) SALR 876 (W.L.D). *Chioza* v *Siziba*, SC 4/15 which was decided in this jurisdiction on the point which is under consideration is to an equal effect. It states that the rule which prohibits the court to enforce an illegal contract is 'absolute and it admits of no exception'. The rule, the court opined, is expressed in the *maxim* '*ex turpi causa non oritur actio*'. It is based on the principle that the court cannot assist a party to defeat the clear intention of an ordinance or statute. The courts of justice cannot, in short, recognize and give validity to that which the legislature has declared shall be illegal and void; and the courts will not permit to be done indirectly and obliquely what has been expressly and directly been forbidden by the legislature'.

Because the validity of the acknowledgement of debt remains questionable, it is only fair that the matter goes to trial where parties will lead evidence and be cross-examined on the same with findings being made for, or against, the one or the other of them. The plaintiff, in the stated set of circumstances, will have the opportunity to explain her case better than she has done in the

provisional sentence summons. She will tell the court what actually occurred when the parties signed the acknowledgement of debt. The defendants, on their part, will also lead evidence and be cross-examined by the plaintiff. They also have the chance to tell the court what actually occurred when they signed the acknowledgment of debt.

For the above reasons, the plaintiff's claim which she rests on the provisional sentence summons cannot succeed. It cannot succeed when the parties were/are at cross-purposes as regards the place where payment of the debt was to be effected. They were not ad idem on the stated matter.

The claim of the plaintiff as contained in the provisional sentence summons is unsustainable. It is, accordingly, dismissed with costs. The parties are directed to proceed in terms of Rule 14 (14) of the rules of court.

Masango Seda Attorneys, plaintiff's legal practitioners
Maguchu & Muchada, defendants' legal practitioners