NATIONAL TYRE SERVICES
versus
HARRY TRUMAN NDLOVU

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 3 October & 10 October 2018

Provisional Sentence

T Chagonda, for the plaintiff
R Nembo, for the defendant

MATHONSI J: The remedy of provisional sentence is available by virtue of r 20 of the High Court Rules, 1971 to a party who is the holder of a valid acknowledgement of debt, commonly known as a liquid document, who may issue summons for provisional sentence based on that document. As stated by the learned authors Herbstein and van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 3 ed, Juta & Co Ltd at p 541:

> "The essence of the procedure then and now is that it provides a creditor who is armed with sufficient documentary proof (a liquid document) with a speedy remedy for the recovery of the money due to him without having to resort to the more expensive, cumbersome and dilatory machinery of an illiquid action. The procedural method of provisional sentence is no magic wand to be used to disarm prospective defendants or dispel all opposition thereto, but is a well-recognised, long-standing and often used mode of obtaining speedy relief where the plaintiff is armed with a liquid document. The purpose of provisional sentence proceedings is to enable the plaintiff to receive prompt payment without having to wait for the final determination of the dispute between the parties."

The present plaintiff is such holder of a liquid document signed by the defendant on 9 January 2018 in the presence of 2 witnesses in terms of which he acknowledged to be "truly and lawfully indebted" to the plaintiff in the sum of $221 674.15 and undertook to liquidate that indebtedness in 3 equal instalments of US$73 891.38 commencing on 31 January 2018. The other 2 instalments were to be paid on 28 February and 31 March 2018. On that acknowledgment of

debt the defendant renounced legal defences, *non causa debiti, non numeratae pecuniae, de errore calculi,* revision of accounts, no value received and any other exceptions which might or could be taken to the claim of the plaintiff. He also declared himself to be fully acquainted with the full meaning and effect of such renunciation.

As a holder of such an acknowledgement debt, a liquid document, the plaintiff sued out a summons for provisional sentence seeking payment of the acknowledged amount, interest at the prescribed rate, costs of suit on a legal practitioner and client scale and collection commission as agreed by the defendant. Not only is the plaintiff a holder of a clearly liquid document, it also holds an unequivocal letter written on the defendant's behalf by his erstwhile legal practitioners Bothwell Ndlovu Attorneys at Law on 4 December 2017 to the plaintiff's legal practitioners in response to a letter of demand addressed to the defendant on 13 November 2017. It is remarkable that the letter in question was written more than a month before the acknowledgment of debt embodying a payment plan was signed by the defendant. It reads:

> "We refer to your letter dated 13 October 2017 (sic) in which we represent our client Mr Ndlovu. Our client is committed in settling the debt and there was nothing fraudulent on his part. The inconveniences caused are as a result of supervening impossibilities. We are advised by our Mr Ndlovu that he has been making payments into your client's account. Its clear indication of his commitment to settle the debt. Kindly enquire from your client as to the outstanding balance. Kindly give us a payment plan since we are committed in settling the debt and we are committed in having a round table meeting."

True to his word as I said, the defendant later penned an acknowledgment of debt on 4 January 2018 making a firm commitment to pay by way of a payment plan, which is relied upon by the plaintiff to move for provisional sentence. Whatever got into the defendant subsequent to making these commitments is not apparent from the papers. He however opposed the claim even though he admitted signing the acknowledgment of debt and did not attempt to disown his signature appended to it. Neither did he allege any undue influence being brought to bear upon him to motivate him to sign the document as he did. Neither did the defendant deny making a commitment to settle the debt through his legal practitioners and suggesting a payment plan even before the liquid document was signed.

Instead the defendant stated that the document is a simulated one representing an undertaking on his part to act as a conduit pipe for receiving money from unnamed external South Africans for onward transmission to the plaintiff who was involved in illegal money laundering

and externalization of money. He stated that between February and December 2017 he was used by the plaintiff as an intermediary to externalise one million dollars to South Africa through a process by which the plaintiff would transfer funds into the defendant's local bank account. This involved what he calls "South African Forex externalisers" who would then direct him, the defendant, to transfer the local funds into their nominated accounts in Zimbabwe. As the arrangement hit turbulence, the plaintiff and his "externalisers" agreed that they would refund the sum of $221 674.15 taken as "excess commission" which money was to be paid into the defendant's account for onward transmission to the plaintiff.

The defendant further stated that because the plaintiff desired to "sanitize" the transaction to protect itself against the government's blitz on externalisers of foreign currency, it then decided to label it as a loan repayment. This resulted in the defendant being made to sign the documents which at the time "seemed harmless". Except that the document itself does not claim to be a loan repayment and that if indeed the defendant had not received the amount in question or its value as he alleges, he would not have had any business signing the document on 9 January 2018. Indeed the elaborate process narrated by the defendant does not make sense, does not disclose any money laundering or externalization of funds and if anything it points to a process wherein the disputed amount was being "internalised" or brought into Zimbabwe. That is not all, other than the defendant's "say so" there is no other evidence he has produced tending to give credence to that elaborate hoax.

On the other hand, the plaintiff's claim is backed by documentary evidence which is not even disputed. It is backed by another letter written on behalf of the defendant by his current legal practitioners on 1 March 2018 in which he again gives an elaborate explanation for his failure to honour the acknowledgment of debt. As he asked for an indulgence to depart from his previous undertaking, the defendant spent a lot of time describing the devastating effects of foot-and- mouth disease at his farm in Chegutu which incapacitated him completely and made him unable to pay the 3 monthly instalments. It is not the foot-and-mouth disease which is significant but the fact that even under the mentorship of his current legal practitioners, the defendant did not disown the liquid document and neither did he advert to the so-called defence now being propagated.

This court has previously summarised the broad principles that have evolved in this jurisdiction in respect of the grant or refusal of provisional sentence based on a liquid document. See *Maseko* v *Ndlovu* HB 20-16 (unreported). They are that:

1. Any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document. See *Sibanda* v *Mushapaidze* 2010 (1) ZLR 216 (N) at 218 E-F.
2. A liquid document which, on the face of it speaks unequivocally, must have the story of the transaction behind it as an investigation into the story may show that the defendant is not liable in terms of the liquid document. See *Allied Holdings Ltd* v *Myerson* 1948 (2) SA 961 (W) at 968.
3. If the court has to go behind the liquid document the onus is on the defendant to show that if evidence is heard the probabilities are that he would succeed. See *Allied Holdings Ltd* v *Myerson (supra).*
4. Where the legality of a document is called into question, as when the document may be tainted with illegality, the court has to decide whether to let the loss lie where it falls or to relax the rule against illegal agreements in order to do justice between the parties, such an inquiry cannot be made at provisional sentence stage but can only be determined at the trial of the matter. See *Matsika* v *Jumvea Zim (Pvt) Ltd & Anor* 2003 (1) ZLR 71 (H).
5. Where the defendant denies that the signature on a document is his or hers or that of an agent, the onus is on the plaintiff to prove that the signature is his or hers. See *Donkin* v *Chiadzwa* 1987 (1) ZLR 102 (H).
6. It would be a travesty of justice if the court were to grant provisional sentence on the strength of vague, confusing and unclear documents whose authenticity has been questioned. See *Briggs* v *Billiati & Anor* HH 749-15 (unreported).

Only principles 2, 3 and 4 above have a bearing on the situation obtaining in the present case. This is because the defendant has volunteered what he regards as the story behind the liquid document and invited this court to go behind the document in order to see that story. He therefore bears the onus to show that if evidence is heard the probabilities are that he would succeed. The defendant has also suggested that he should not be held liable in terms of the liquid document

because it is a simulation of an illegal money laundering or externalisation of foreign currency transaction.

The question which arises is whether the defendant has discharged the onus resting squarely on him. I do not think so. If a court is to deny a plaintiff a remedy that is provided for in the rules, that of provisional sentence on the strength of a liquid document, surely there must be evidence pointed to by the defendant which can possibly lead to a finding, were the matter to be stood down for trial, that the defendant is not liable in terms of the liquid document. In my view the probabilities become even more heavily tilted against a defendant who admits appending his or her signature on the liquid document freely and voluntarily without any form of undue influence being brought to bear upon him or her to sign the liquid document.

This is because other legal principles, in particular the *caveat subscriptio* doctrine and the sanctity of contract doctrine, are automatically activated by the admission by the defendant that it is his or her signature on the liquid document. Simply put the *caveat subscriptio* rule is that in our law of contract a person is bound by what appears above his or her signature in a document. It has been stated that when one person signs a contract, they are taken to be bound by the ordinary meaning of the words which appear over his or her signature. Surely a fair-minded and reasonably schooled person should know that when asked to append a signature on a document which expressly states that he or she is liable and would pay a debt on certain terms and conditions, the signature signifies assent to those terms and conditions. See *George* v *Fairmead (Pty) Ltd* 1958 (2) SA 465 (H) at 472A.

By the same token, the principle of sanctity of contract postulates that when people of full legal capacity have entered into agreements freely and voluntarily with their eyes wide open, it is not for the courts to rewrite those contracts for them. Instead the courts are only required to give effect to and enforce those agreements and not to excuse any party from them. See *Magodora & Ors* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S). Therefore in order to repel a claim for provisional sentence where the signature on the liquid document is not denied, the defendant is required to show that the prospects of success in the main, are in his or her favour and that the plaintiff may not succeed.

I have already said that the alleged story behind the liquid document as presented by the defendant cannot rebut the plaintiff's claim which is backed by documentation because it is merely

the defendant's "say so". I must add that the story itself appears wholly improbable and fanciful in the extreme. I conclude that the defendant has not discharged the onus of showing that if the matter is stood down for trial he would succeed.

Judgment should be entered in favour of the plaintiff.

In the result it is ordered that:

1. The defendant shall pay to the plaintiff the sum of US$221 674.15 together with interest at the prescribed rate from 2 March 2018 to date of payment in full.
2. The defendant shall pay costs of suit on a legal practitioner and client scale and collection commission in terms of the Law Society of Zimbabwe tariff.

Atherstone & Cook, plaintiff's legal practitioners
Nembo Attorneys, defendant's legal practitioners