

ECOBANK ZIMBABWE LIMITED  
Versus  
SOLGAS (PRIVATE) LIMITED  
And  
TAFADZWA MUNDICHA  
And  
KINGSTON GAMUCHIRAI LEON KAMBA  
And  
PETROS KAZUNGU

HIGH COURT OF ZIMBABWE  
COMMERCIAL DIVISION  
CHILIMBE J  
HARARE 13 November 2024 and 14 February 2025

### **Provisional sentence summons**

*N. Mugandiwa* with *S.M. Bhebhe* for plaintiff  
*M.A. Masona* for first, second, third and fourth defendant

CHILIMBE J

#### BACKGROUND

[1] I furnish hereunder on request, the reasons for my ruling in granting a provisional sentence order after appearance of the parties on 13 November 2024. The order directed the defendants jointly or severally to pay plaintiff the sum of US\$568,930.27 plus interest and costs.

[2] I may state at the outset that once a notice of opposition is filed before the set down date of a provisional sentence summons, the matter automatically converts to an opposed application. This is the direction in r 14 (7) of the High Court Rules, SI 123/2021 (“the High Court Rules”) which governs the provisional sentence procedure. It is the responsibility of the plaintiff to have the matter referred to the opposed roll.

[3] Secondly, the defendant’s options on the set down date are limited to admitting to the claim, confirming validity of his signature on the liquid document or disputing the claim [rr 14 (8) and 14 (9)]. Lastly, it must at all times be remembered that provisional sentence offers a “*brisk and robust remedy*”<sup>1</sup>. It is both summary and provisional as per r 14 (6) which provides that; -

---

<sup>1</sup> To use the words of MAKARAU JP as she was then, in *Zimbank v Interfin Merchant Bank of Zimbabwe Ltd* 2005 (1) ZLR 114 (H) at 116F-117A

14(6) Matters for provisional sentence shall be set down on a roll assigned for such matters not being a day assigned for unopposed matters and shall be disposed of as expeditiously as possible having regard to the nature of the remedy of provisional sentence.

I shall discuss r 14- together with the authorities on the matter in greater detail hereunder. Meanwhile, I turn to the facts on the dispute

#### THE LOAN AND SECURITY AGREEMENTS

[4] The plaintiff (“Ecobank”) is a bank registered and licenced in terms of the laws of Zimbabwe. In that capacity, it offers loans, advances and other such credit facilities to borrowers. The first defendant (“Solgas”) is also a registered entity in terms of the laws of Zimbabwe. It is in the business of solar power generation.

[5] By written agreement dated 27 July 2023, Ecobank extended loan for capital expenditure in the sum of US\$450,000.00 to Solgas. In terms of that agreement, titled “Working Capital Facility Agreement” (referred herein as the “loan agreement”), Solgas undertook to liquidate the principal and interest due in 24 monthly instalments commencing 25 September 2023.

[ 6] It was a further term of the loan agreement that interest would accrue on the loan facility at Ecobank`s base minimum lending rate (“BMLR) plus 1%. In the event of default on any instalment, interest would accrue on the balance at a rate of 8% above Ecobank`s said BMLR. In addition, Solgas agreed to pay legal fees at an attorney client scale in the event of Ecobank instituting proceedings in terms of the loan agreement.

[ 7] Ecobank secured the loan through separate guarantees issued on 28 July 2023 in its favour by second, third and fourth defendants in terms of clause 5.1.4 of the loan agreement. It also concluded on 2 August 2023, as additional security, an agreement with Solgas titled “Movable Property Security Agreement” (“the security agreement”). This agreement was concluded as a condition precedent to the loan agreement per clause 5.1.1.

[8] It was executed pursuant to, and governed by the Movable Property Security Interest Act [ Chapter 14:35], (the “Movable Property Security Act”). It is this security agreement that founds the liquid document herein. It is common cause that Solgas and its three co-defendant failed to keep up with the loan instalments. Ecobank instituted present proceedings alleging breach by the defendants of their obligations under the loan and security agreements.

THE NOTICE OF SECURITY INTEREST IN TERMS OF SECTION 8 OF THE MOVABLE PROPERTY SECURITY ACT

[9] I now address the security agreement. Under that contract, Solgas offered to Ecobank as movable security, a solar power generation plant. The asset was registered under a Generation and Supply Licence Number 0046/2026, and known as the Cross Mobale Power Plant in Hwange. As noted above, the obligation was created and formalised in terms of the Movable Property Security Act. Clause 3 of the security agreement provided for the registration of that agreement with the Collateral Registry in terms of the Movable Property Security Act.

[10] I may state that the Movable Property Security Act is a recent piece of legislation in the jurisdiction<sup>2</sup>. It introduces new perspectives in the identification, definition, registration, perfection, preservation and realisation of movable security. I will thus dwell on it briefly. By s 4, the Movable Property Security Act provides for the creation of a facility for the registration of movable collateral under the auspices of the Reserve Bank of Zimbabwe (RBZ). The collateral registry's purpose and functions are set out in part as follows in s 5; -

5. Purpose and functions of Registry

- (1) The purpose of the Registry is to facilitate commerce, industry and other socio-economic activities by enabling individuals and businesses to utilise their movable property as collateral for credit.
- (2) Accordingly, the functions of the Registry are—
  - (a) to enable security interests over movable property to be perfected by receiving and storing registered notices with respect to security interests; and
  - (b) to amend or cancel the registered notices of security interests in movable property; and
  - (c) to make accessible to the public information in registered notices with respect to security interests; and
  - (d) to maintain a database of—

---

<sup>2</sup> Whilst originally published as Act No. 9 of 2017, it came into effect on 4 November 2022 via the Date of Commencement: Movable Property Security Interests Act [Chapter 14:35] (No. 9 of 2017) SI 190 of 2022.

- (i) relevant information on debtors and secured creditors identified in registered notices; and
- (ii) relevant information on any movable property subject to registered notices of security interests

[11] The security agreement was duly registered with the Collateral Registry. The Collateral Registry in turn, issued a confirmation (of registration of security) statement on 31 August 2023. The confirmation statement recorded Ecobank and Solgas as debtor and creditor respectively. In addition, it set out the two parties' particulars, details of the primary indebtedness as well as the asset secured. The maximum enforceable amount (based on the formula of Principal Amount + Interest + Other Costs) was marked as US\$611,325,00.

[12] The confirmation statement or registered notice is a simple document issued in an electronic or dematerialised state. It departs greatly in format from the traditional types of registered encumbrances. More substantively, the confirmation statement becomes, by virtue of s 8 of the Movable Property Security Act, a statutory liquid document.

[13] This status separates the registered notice of a security interest from ordinary liquid documents executed privately between individual creditors and their debtors. I set out s 8 of the Movable Property Security Act below; -

#### 8. Enforcement of registered notices relating to security interests

- (1) Every registered notice of a security interest is deemed to be a liquid document enforceable by way of provisional sentence proceedings.
- (2) If the terms of a security agreement creating a security interest so allow, the secured creditor may seize and take custody of the movable asset subjected to the security agreement pending the grant of provisional sentence in relation thereto.
- (3) Additional provisions on the enforcement of security interests are set forth in Part V of the Second Schedule.

#### THE PROVISIONAL SENTENCE PROCEEDINGS

[14] The provisional sentence summons was set down on the unopposed motion roll on 13 November 2024. The defendants filed a notice of opposition just the day before on 12 November 2024. Mr. *Mugandiwa*, for Ecobank contended that the opposition was irregular. It

ought, according to him, to have been filed at least 10 days before the set down date. That submission was incorrect and misleading. Rule 14 (7) permits a defendant to file its notice of opposition prior to the appointed day. It provides thus; -

14 (7) Prior to the date stated in the summons for appearance to answer the plaintiff's claim, the defendant may file a notice of opposition in Form No. 24, together with one or more supporting affidavits in which event the provisions of these rules shall apply, with the necessary changes to the service of a notice of opposition in terms of this subrule and to the filing and service of any answering affidavits or further affidavits by the parties.

[ 15] The notice of opposition was therefore validly before the court. This error was aggravated by none other than the defendants' legal practitioner herself. Ms *Masona* admitted that the notice of opposition was improperly before the court. In fact, counsel went so far as to suggest that an application for condonation was underway to remedy the breach! Obviously that position was ill-informed. The proper procedure though in those circumstances, was for Messrs *Mugandiwa* and *Bhebhe* to apply, as was their obligation, for the removal of the matter from the unopposed roll.

[16] This approach is now well settled. In *Al Shams Global BVI Ltd v Equity Properties (Pvt) Ltd* 2013 (2) ZLR 131 (H), this court per ZHOU J resolved the residual inconsistencies in the approach to provisional sentence matters. The learned judge held as follows at 135 C; -

“In the two cases before me opposing papers were filed prior to the date of the hearing. Thus, the plaintiff knew then that in the two matters provisional sentence was being contested. The matters should not, therefore, have been set down on the unopposed roll. Contested cases for provisional sentence have previously been heard as opposed applications as shown by some judgments of this court. See *Mavindidze & Anor v Mukonoweshuro* 2010 (1) ZLR 191 (H); *Sibanda v Mushapaidze* 2010 (1) ZLR 216 (H). The attention of litigants is therefore directed to the provisions of the Rules regarding the setting down of contested cases for provisional sentence.”

[17] I nonetheless proceeded to hear the parties to ascertain the defendants' position as required by r 14 (8) or 14 (9) following indications that the claim was not being contested. Mr. *Mugandiwa* informed the court that the opposing affidavits filed by the defendants in any event, acknowledged the claim and did not in any way challenge the liquid document. Instead, they

raised other matters or defences not relevant for purposes of the provisional relief sought. There was basically no controversy before the court.

[18] Ms *Masona* confirmed that the claim was not disputed. Neither were the defendants contesting the validity of the liquid document. The defendants, however, argued-in their notice of opposition- that the parties novated the original contract. There existed between the parties, what counsel termed a relational contract. That contract governed the parties under a banker-client arrangement. At stake was the undertaking by Ecobank to establish a letter of credit to the value of US\$3,000,000 which undertaking the bank had breached.

[19] Having listened to Ms *Masona*; my conclusion was that the defendants indeed admitted the claim. The liquid document founding the provisional summons was not disputed. In reaching such decision, I considered the underlying loan contract between Ecobank and Solgas. That agreement gave birth to the security undertakings; - the guarantees and registered security interest.

[20] Under those agreements, Ecobank had appropriated to itself, a slew of favourable provisions under the loan agreement, guarantees and security agreement. I need not detail each and every one of these. But as an example, the loan agreement had clauses 10, 11, and 12 dealing with “other loan conditions”, “warranties” and “events of default”. These agreements did not admit the defences now being posed by the defendants. The result being to lend credence to Mr. *Mugandiwa*`s averment that Ecobank`s provisional claim, was uncontested.

[21] Further, Ecobank was armed with a statutory liquid document whose validity was also not challenged. In that respect, the concessions tendered on behalf of the defendants confirmed Ecobank`s prima facie case. I was also persuaded by the age-old considerations that provisional sentence is a summary procedure. It leads to provisional relief which may be defended in the main action. But in the interim, a deserving plaintiff armed with incontrovertible prima facie proof of its claim in the form of a liquid document must obtain interim relief. In *Interfin Banking Corp Ltd v Veanarcy (Pvt) Ltd* 2013 (2) ZLR 589 (H) at 593 E- H it was held that; -

“The provisional sentence procedure is designed to afford summary relief to a plaintiff whose claim is clear and based on a written acknowledgement of debt called a liquid document. Makarau JP, as she then was, said in *Sibanda v Mushapaidze* 2010 (1) ZLR 216 (H) at 220F-G: “Provisional sentence procedure is a summary procedure that allows the holder of a liquid document to obtain judgment and execute upon that

judgment before the trial of the matter. In that regard, it may be termed an extraordinary remedy procedure, although it has been part of our civil process for decades.”

TLALETSI J in the two *Momentum Group Ltd* cases above, in paras 12 and 13 of the judgment, put it as follows: “[12] It is trite that provisional sentence procedure provides a process whereby a creditor who has sufficient documentary proof with a speedy remedy for the recovery of money due without having to go through an expensive, cumbersome and often dilatory machinery of an illiquid action. A creditor who has a liquid document is able to obtain an enforceable provisional judgment speedily without having to wait for the final determination of the dispute between the parties.”

[22] Guided by the well-defined procedure in the rules and decided cases, our courts have always underscored the robustness of provisional sentence remedy. [15] I refer to the following approaches dictated by the remedy;

MAKARAU JP as she was then, in *Zimbank v Interfin Merchant Bank of Zimbabwe Ltd* 2005 (1) ZLR 114 (H) at 116F-117A; -

“It is a brisk and robust remedy granted by the court in appropriate cases, on the date of the hearing endorsed on the face of the summons, after the court has satisfied itself that the defendant has no probability of success in the principal case.”-

ZHOU J held, in *Al Shams Global BVI Ltd v Equity Properties (Pvt) Ltd*,

“In the instant cases I heard argument on the merits, albeit the plaintiff had not filed heads of argument, principally because the matter was set down on the unopposed roll. In opposition to the claim for provisional sentence the defendant contends that the plaintiff is not the holder of the instruments upon which the claims are founded.”

MAFUSIRE J in *Interfin Banking Corp Ltd v Veanarcy (Pvt) Ltd* 2013 (2) ZLR 589 (H); -

“In my view, the efficacy of the provisional sentence procedure would be compromised if the summary nature of the proceedings were to be transformed into a fully-fledged opposed motion matter by canvassing in much detail the merits of the claim and the merits of the defence. It is not suggested that in every situation that a

plaintiff produces a liquid document and claims provisional sentence on it the court cannot go behind that document. In appropriate situations it can. And the onus remains on the plaintiff.”

DISPOSITION

[23] I conclude by reiterating my opening remarks. Notwithstanding the robust approach adopted herein based on the admission made, an opposed provisional sentence summons must be referred to the opposed roll. Herein, as stated, in the face of the admissions of liability, I proceeded to order that; -

Plaintiff’s claim be granted in terms of the provisional sentence summons with costs as prayed.

*Wintertons*- plaintiff’s legal practitioners

*R. Murambasvina Law Chambers*-defendants’ legal practitioners

[CHILIMBE J\_\_\_14/02/25]