CRANRID INVESTMENTS (PRIVATE) LIMITED T/A CRANRID PETROLEUM
versus
MARISOL GAS AND PETROLEUM (PRIVATE) LIMITED
and
RUDO RUTENDO MWATUTSA

HIGH COURT OF ZIMBABWE
MAMBARA J
HARARE 11 & 17 February 2025

Opposed Application

R. T. Mutero, for the plaintiff
T. G. Chigudugudze, for the defendants

MAMBARA J: This is a case in which the plaintiff seeks a provisional sentence arising from an acknowledgment of debt executed by the first defendant. The plaintiff contends that the acknowledgment of debt is a liquid document warranting enforcement without further inquiry, while the defendants argue that the document is not liquid due to unresolved business transactions, requiring reconciliation of accounts before payment can be determined.

The first defendant further contends that the plaintiff's unilateral cessation of fuel supply frustrated its ability to perform, invoking the doctrine of fictional fulfilment which dictates that a creditor cannot demand performance when they have actively prevented it.

Lastly, the defendants argue that there is a misjoinder of the second defendant. The second defendant simply acted as the first defendant's representative in this matter and is therefore not a proper and necessary party to the present proceedings.

FACTUAL BACKGROUND

The facts of the matter are largely common cause. The plaintiff is an entity engaged in the fuel supply business. It entered into a Marketing License Agreement with the first defendant, Marisol Gas and Petroleum (Private) Limited. Under the terms of the agreement, the plaintiff would supply petroleum products to the first defendant, who would in turn market and sell them to third-party customers. The essential terms of the agreement included the following:

(a) The plaintiff retained ownership of the fuel until sold to customers.

(b) The first defendant was free to use any commercially reasonable method to market and sell the plaintiff's fuel, including credit sales.

(c) The first defendant was responsible for collecting payments from customers and remitting the proceeds to the plaintiff.

(d) The first defendant was entitled to a marketing throughput margin of US$0.07 per litre.

(e) Payments to the plaintiff were to be made within an agreed timeline after the sale of the fuel.

The relationship between the parties proceeded without difficulty until disputes arose regarding payments owed to the plaintiff. The first defendant fell into arrears, citing business challenges and difficulties in collecting payments from customers. As a result, the first defendant, through its agent, the second defendant, executed an Acknowledgment of Debt (AOD) in favour of the plaintiff, committing to settle the outstanding amount.

The plaintiff, relying on the acknowledgment of debt, expected full and immediate payment. However, shortly after executing the AOD, the plaintiff unilaterally ceased fuel supply to the first defendant without prior notice. The defendants argue that this unilateral cessation of supplies crippled their ability to generate revenue and honour their debt obligations.

LEGAL ANALYSIS

The key issue before this Court is whether the acknowledgment of debt is truly **l**iquid and enforceable through provisional sentence**.** The plaintiff relies on the principle that a liquid document must not require extrinsic evidence to establish liability, citing *First Merchant Bank of Zimbabwe Ltd* v *Forbes Investments (Pvt) Ltd & Anor* 2000 (2) ZLR 221 (S)**:**

> "A liquid document is one that, ex facie, contains a clear and unconditional admission of liability and the amount owed. The document must not require external proof or further inquiry to establish liability."

On the other hand, the defendant argues that even before signing of the acknowledgement of debt the parties were not agreed on the sum outstanding. A clear example is that at one stage the defendant's client, called Voedsel Tobacco International (Pvt) Ltd ("Voedsel") bought fuel on credit. It then failed to pay for the fuel. Voedsel then offered to swap the debt with a motor car. The plaintiff was advised of the suggested mode of settlement and it accepted the motor vehicle. The motor vehicle was then delivered to the plaintiff who, as acknowledgment of delivery, furnished the defendant's representative with an affidavit as

proof of receipt. The affidavit read, in part that, *"The set-off resembles full and final settlement of the debt"*

The above notwithstanding, even after accepting the set-off in full and final settlement of the Voedsel debt, the plaintiff's record of accounts still showed that an amount of US$2 751.00 was still outstanding. The parties were yet to settle this issue. Despite this disagreement, the figure was included in the acknowledgement of debt.

The defendants argue that the acknowledgement of debt is not liquid because it has this and other stories behind it. Those stories must be ventilated during trial. The stories must be heard. An acknowledgement of debt that leaves room for reconciliations or future adjustments cannot be considered a liquid document for the purpose of provisional sentence.

In *Marjorie Fadziso Mutemererwa* v *Shingirai Albert Munyeza and Wilma Munyeza* HH 437/23, MANGOTA J faced with a similar situation as in casu wrote:

> "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 a chance to tell the court what actually occurred when they signed the acknowledgement of debt."

The plaintiff argues that the lack of explicit defences in the AOD strengthens its case. However, in MAFUSIRE J's judgment in *Saunders* v *Blumears* HH 234/23**,** the court emphasized that an acknowledgment of debt must at least have some reference to defences, however inelegantly drafted:

> "While an acknowledgment of debt may be a liquid document, it does not preclude a debtor from raising bona fide defences that point to external considerations affecting the enforceability of the debt. If the acknowledgment itself references pending reconciliations, set-offs, or adjustments, such an instrument ceases to be liquid."

In this matter, the acknowledgement of debt can be summed up as one short paragraph. It reads;

> "I, the undersigned Rudo Mwatutsa…representing Cp Marisol Gas & Petroleum do hereby acknowledge that I am truly and lawfully indebted to CRANRID INVESTMENTS T/A CRANRID PETROLEUM in the sum of TWO HUNDRED AND EIGHTEEN THOUSAND FIVE HUNDRED AND FIFTY SIX UNITED STATES DOLLARS ONLY US$218 556, being for fuel drawdowns at MARISOL CHITUNGWIZA. I hereby bind myself to pay the full amount of the said capital by no later than 20 October 2024. Interest will be charged should payment not be received on the due date."

The defendants' position is that it was not inconsequential that the acknowledgement of debt did not renounce any legal exceptions and the legal protection accorded by those exceptions. Whilst the plaintiff accepts that that no defences were renounced it points out that these defences are not there for the taking on a silver platter. As authority for this proposition it relies on the *Saunders* v *Blumears* case *supra* in which provisional sentence was granted on the justification that the defences raised by the defendant could be sustained as the acknowledgement of debt took care of the purported defences by renounces, albeit in elegant terms, all legal defences and exceptions. In that judgment MAFUSIRE J wrote:

> "Be that as it may, the reason why I granted a provisional sentence on 19 October 2022 was because the defendant's so-called defences were manifestly a smokescreen, a ploy to buy time and an abuse of the court process. The plaintiff's claim was based on an acknowledgement of debt. The document might have been amateurish. It might have lacked legal finesse. It was undoubtedly the product of lay legal minds. But it was classically an acknowledgement of debt. It was just as good as they come. Among other things, a typical acknowledgement of debt drafted by, or copied from lawyers' drafts, normally renounces the benefit of a host of the legal exceptions, all expressed in the latin language, such as exception errore calculi [there was an error in the calculation of the debt] or exception non causa debiti [there was no cause for the debt]. But in the current case, in one critical sentence, the acknowledgement of debt simply provided that, "I further acknowledge that there are no defences to the amount owed." that took care of all the defendant's purported defences."

There is nothing in the entire text of the acknowledgment of debt which "takes care of any of the defendant's defences" The defendants are not precluded from raising any legitimate defences that they may have and this they can only do through an action process.

Further, the defendants argue that the plaintiff cannot succeed in a provisional sentence claim where a balance of probabilities suggests that it may not succeed in the principal case. This principle is established in *Mashingaidze* v *Sibanda* HH 56/2011**,** where the court ruled:

> "A court may refuse provisional sentence where it is satisfied, on a balance of probabilities that the plaintiff's claim in the principal case is unlikely to succeed."

Moreover, the defendants argue that the doctrine of fictional fulfilment should apply because the plaintiff made it impossible for the defendants to pay the debt by unilaterally cancelling the contract between the parties. In *Scholtz* v *Scholtz* 1981 (3) SA 139 (A), the court held:

> "Where one party prevents the other from fulfilling their contractual obligation, the law deems the obligation as fulfilled, to prevent unjust enrichment."

Applying this doctrine, the plaintiff's unilateral cessation of fuel supply rendered it impossible for the defendants to generate revenue, making enforcement of the AOD inequitable.

Critically, the acknowledgment of debt signed by the defendants is bare and has no reference to any defences whatsoever. The defendants argue that the AOD was signed under the assumption that the contractual relationship would continue and that payments to the plaintiff would be sourced from creditors. These assumptions are not seriously disputed by the plaintiff, further weakening the enforceability of the document. In light of this, the AOD does not meet the threshold of a truly liquid document as its enforceability is dependent on underlying business arrangements, which require further factual inquiry.

The plaintiff's claim is based on a document signed by the second defendant in a representative capacity for and on behalf of the first defendant. The joinder of the second defendant is therefore improper. The law is clear that where a person contracts as an agent for a principal the contract is the contract of the principal and not that of the agent.

The plaintiff invites the court to piece the corporate veil. In the authorities it relies on, *Cattle Breeders Farm (Pvt) Ltd* v *Veldman* (2) 1973 (2) RLR 261 and *Cape Pacific Ltd* v *Lubner Controlling Investments Pty Ltd and Others* 1993 (2) SA 784, justification for piecing the corporate veil was made in a full trial after parties had led evidence demonstrating that the person sought to be joined was the person who dealt with the other party albeit as the alter ego of that defendant. Such a finding cannot be made in summary proceedings such as these.

Courts have consistently maintained that piercing the corporate veil is only applicable in cases of fraud or abuse of the corporate entity. In *Salomon* v *Salomon & Co Ltd* [1897] AC 22, the principle was firmly established:

> "A corporation is a distinct legal entity from its shareholders and directors. Unless fraud is established, the courts will not disregard the separate personality of the company to attach liability to individuals."

Rule 32(12) of the High Court Rules, 2021 provides as follows:

> "At any stage of the proceedings in any case or matter the court may on suc terms as it thinks just and either on its own initiative or on application -
> (a) Order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party
> (b) ……" (Omissions are mine)

It is clear that the second defendant is not a proper and necessary party to the proceedings and therefore must be removed.

DISPOSITION

In light of the above findings, the following order is made:

(a) The provisional sentence is refused as the acknowledgement of debt is not purely liquid.

(b) The matter shall stand over for trial in terms of Rule 14(14) of the High Court Rules, 2021.

(c) The second defendant is removed from the proceedings as there is no basis for the piercing of the corporate veil.

(d) Costs shall be in the cause.

IT IS SO ORDERED.

MAMBARA J: ……

Mutamangira & Associates, plaintiff's legal practitioners
Madanhe & Chigudugudze, defendants' legal practitioners