CHIPS ENTERPRISE SOLUTIONS (PRIVATE) LIMITED
t/a PASTEL SOFTWARE ZIMBABWE
versus
FLY CATCHER TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 4 June 2021 and 30 June 2021

Opposed matter

B.S. Ziwa, for the plaintiff
S. Chigumira, for the defendant

MANGOTA J: I heard this matter on 17 March, 2021. I delivered an *ex tempore* judgment in which I granted the plaintiff's claim as prayed in the draft.

On 23 April, 2021 counsel for the defendant wrote requesting for reasons for my decision. These are they:

On 3 August, 2016 the defendant executed an acknowledgement of debt in favour of the plaintiff. It acknowledged its indebtedness to the plaintiff in the sum of US$31 780.8 and in a further sum of ZAR 458,799.8 together with interest at 10% per annum. It paid off the sum of US$31 780.8. It left the balance of ZAR 458, 799.8 unpaid.

The unpaid sum constitutes the plaintiff's cause of action. It sued for the recovery of the stated sum. It did so by way of provisional sentence summons which it issued on 23 July, 2020.

The defendant opposes the suit. It alleges, *in limine*, that the plaintiff's claim is prescribed. It states, on the merits, that the outstanding sum of ZAR 458 799.8 should be paid off in the local currency at the rate of 1:1 with the United States dollar. It places reliance on Statutory Instrument 33 of 2019 as read with Statutory Instrument 142 of 2019 in the mentioned regard.

A suit by way of provisional sentence summons is permissible in terms of the High Court Rules, 1971. The same is provided for under Order 4 of the Rules of Court. Its only requirement is that the plaintiff who is claiming provisional sentence must hold a valid written acknowledgement of debt. The liquid document which he holds constitutes his passport to the suit which he is instituting.

Sibanda v *Mashapaidze*, HH 56/11 defines the meaning and import of the phrase liquid document. It states that any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document.

The plaintiff is a holder of a clear, unequivocal and unambiguous written promise to pay a debt. He holds a liquid document. This enables it to sue the defendant under Order 4 of the Rules of this court. It attached the acknowledgment of debt to its summons for provisional sentence. It marked it Annexure A.

The annexure appears at page 3 of the record. It was signed by the defendant on 3 August, 2016. Its contents acknowledge the defendant's indebtedness to the plaintiff in the sum of ZAR 458 799.4 as well as in that of US$31 730.8.

The defendant does not dispute the existence of the annexure or its validity. It does not controvert its contents. It does not deny or dispute its signature which appears on the annexure.

All that the defendant is insisting upon is that the claim is prescribed and/or that statutory instrument 33 of 2019 as read with Statutory Instrument 142 of 2019 allows it to liquidate its indebtedness to the plaintiff in Zimbabwe dollars at the rate of 1:1 with the United States dollars.

The defendant's first line of defence, it is evident, is that of prescription. Prescription is a *sine qua non* aspect of our law. Its importance is evident from the fact that the legislature enacted a law which deals with prescription of matters. Reference is made in the mentioned regard to the Prescription Act [*Chapter 8:11*] ["the Act'].

It is clear, from a reading of the Act, that it was enacted to compel persons who have claims against others to file their claims timeously. Those of them who fail to sue within the times which are stipulated in the Act lose their right to sue or, if they sue, the sued person can raise the defence, as the defendant *in casu* is doing, that the claim is prescribed. Prescription thrives on the principle which is to the effect that the law assists the vigilant and not the sluggard: *Ndebele* v *Ncube* 1992 (1) ZLR 288 (SC).

The long title of the Act says it all. It refers, in part, to the extinction of debts by prescription. It defines a debt to include anything which may be sued for or claimed by reason of an obligation which arises from statute, contract, delict or otherwise.

Subsection (1) of s 14 of the Act is instructive. It states that a debt shall be extinguished by prescription after the lapse of the period which, in terms of the relevant enactment, applies in respect of the prescription of such debt. Section 15 of the Act speaks to periods of prescription of debts. Paragraph (d) of the section, for instances, places the prescription of a debt which falls outside the periods which are stated in paras (a), (b) and (c) of the section at three (3) years.

What the paragraph, in effect, is saying is that a person who has a claim which falls outside paragraphs (a), (b) and (c) of s 15 of the Act has the right to sue within three years of his knowledge of the identity of the debt and of the facts from which the debt arises. It follows, from the stated fact, that if he does not sue within the stipulated period, he forfeits his right to sue and claim the debt from the debtor and, where he sues outside the three-year period, the debtor will raise the defence of prescription. He will simply state that the creditor's debt is prescribed and will, in the process, be allowed by law to ward off the creditor's claim.

The above analysed matter constitutes the defence of the defendant in *casu*. It, in essence, asserts that it signed the acknowledgement of date on 5 August, 2016 and the plaintiff instituted this suit on 23 July, 2020. It insists that the claim which the plaintiff instituted close to four years after the event is prescribed.

The question which begs the answer is whether or not the claim of the plaintiff is prescribed as the defendant would have me believe. The claim is, on the face of it, prescribed. However, the Act talks of instances where prescription cannot run or where the running of prescription becomes interrupted. It states, in s 18, that the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

MATHONSI J (as he then was) eloquently stated the position of the law on the matter which relates to the issue of interruption of the running of prescription. The remarks which the learned judge made in *Jovennar Enery Services (Pvt) Ltd* v *Pickglow (Pvt) Ltd* HH 504/15 are apposite. He said:

> "There can be no doubt therefore that if a debtor expressly or tacitly acknowledges the debt the running of prescription will be interrupted and the debt will not be extinguished at the expiration of three years from the due date."

It is a fact that the plaintiff premises its suit upon the defendant's express acknowledgment of debt. The defendant's acknowledgement of debt interrupts the running of prescription. The defense of prescription is not therefore available to the defendant which acknowledged, in writing, its indebtedness to the plaintiff. The law of prescription cannot remain on the side of the defendant who expressly acknowledges his liability to the plaintiff. A *fortiori* when his acknowledgment of the debt is in the form of a document the existence of which the defendant is not disputing. Section 18 of the Act will not support his defence in the stated set of circumstances.

It follows from a reading of s 18 of the Act together with the contents of the annexure that the defendant's defence of prescription is misplaced. It is not available to it at all. It is without merit and it cannot therefore stand.

The defendant's second defence is premised on the provisions of Statutory Instrument 33 of 2019 as read with Statutory Instrument 142 of 2019. Its assertion is that the legislation which the legislature introduced in 2019 did away with the multiple-currency form of payment which came into existence in 2009 leaving the local currency as the only acceptable legal tender in Zimbabwe. It places reliance, in the mentioned regard, on *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N. R Barker (Pvt) Ltd and Another*, SC 3 of 2020.

The plaintiff disputes the defendant's second defence. It asserts that what is in issue is the payment to it by the defendant of South African Rand and not United States dollars which the defendant, according to it, has already paid. The court, it insists, is dealing with a liquid document which is sounding in South African Rand. It states that the defendant's intention to pay the amount which is due to it in Zimbabwe dollars at a rate which it knows to be without basis is inconsequential and disingenuous. It insists that Rand debts were never converted to any other currency by any law. It asserts that the outstanding debt of ZAR458 799.8 remains payable in the currency that it was originally denominated.

I observe and mention in passing that the defendant discharged its obligation to the plaintiff in the sum of US$31 780.8. What it is still to pay is the outstanding sum of ZAR458 799.8. Both debts, it is a fact, are acknowledged by it in the liquid document, Annexure A, which the plaintiff attached to its summons for provisional sentence.

Because the defence of the defendant is resting on Statutory Instrument 33 of 2019, it is pertinent for me to examine the relevant portion of that Statutory Instrument. Section 4(d) of the instrument is relevant. It reads:

> "for accounting and other purposes, all assets and liabilities that were immediately before the effective date, <u>valued and expressed in United States dollars</u> (...) shall on and after the effective

> date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar". (emphasis added)

The words of the section of the Statutory Instrument are as clear as night follows day. They require no interpretation at all. They should, therefore, be taken as they appear in the Statutory Instrument upon which the defendant's defence is premised.

The section of the instrument makes reference to assets and liabilities that were valued and expressed in no currency other than in United States dollars. It is only such assets and liabilities as were/are, immediately before the effective date of 22 February 2019, expressed in United States dollars which qualify to be values in RTGS dollars at a rate of one-to—one to the United States dollar. Any asserts and/or liabilities, it logically follows, that were/are valued and expressed in a currency which falls outside United States dollars cannot be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar.

The defendant's defence would have held if the case of the parties centred on the payment to the plaintiff by the defendant of the sum of US$31 780. 8 which was/is part of the defendant's acknowledged debt. The moment that the defendant paid off that part of its debt, s 4(d) of the instrument which it places reliance upon ceases to apply. The section does not apply to the unpaid sum of ZAR 458 799.8. The currency of the rand which the defendant acknowledged to be owing to the plaintiff falls outside the provisions of the Statutory Instrument.

The defendant's second line of defence is misplaced. It, in my considered view, arises from its misconstruction of clear provisions of the Statutory Instrument upon which it places reliance. Its statement which is to that effect that the outstanding sum of ZAR 458 799.8 should be converted into dollars at the prevailing rate and then became payable in RTGS dollars exposes itself to the knowledge that the Statutory Instrument relates to assets and values which were expressed in United States dollars on or before the effective date of 22 February, 2019. The statement is, however, as far- fetched as it is the guess of all and sundry. It is more in the area of conjecture than it is in that of any attempt by the defendant to liquidate its indebtedness to the plaintiff as it should.

The defences which the defendant raises are completely devoid of merit. They leave the case of the applicant in an unassailable manner. They are either arising from a misconstruction of the law by the defendant or the latter's intention to try its luck with the laws of prescription and that of Statutory Instrument 33 of 2019 as read with Statutory Instrument 142 of 2019.

The plaintiff proved its case on a balance of probabilities. Its claim, is therefore, granted as prayed.

Gill, Godlton & Gerrans, plaintiff's legal practitioners
Matizanadzo & Warhurst, defendant's legal practitioners