

ZUVA PETROLEUM ONE (PVT) LTD

Versus

TAWANDARUZIVE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 24 JANUARY & 13 FEBRUARY 2014

E. Jera for applicant
C. Dube for respondent

KAMOCHA J: In this matter the plaintiff issued summons for provisional sentence claiming the sum of US\$62 139,63, together with interest thereon at the prescribed rate calculated from 15 September 2012 to date of payment in full, costs of suit on the attorney and client scale and collection commission at 10% of that amount.

Plaintiff's claim was based on an acknowledgement of debt executed by the defendant on 31 August, 2012 in favour of the plaintiff which is quoted *in extenso* hereunder.

"ACKNOWLEDGEMENT OF DEBT

I, Tawanda Ruzive, I.D. No. 29-013045 S 77 (the debtor) of 21A Whitestone Way Burnside, Bulawayo (which I hereby irrevocably choose as my *domicilium citandi* for all purposes in connection with this acknowledgment of debt) do hereby acknowledge as follows:-

- (1) I am bound as the debtor to Zuva Petroleum One (Private) Limited (formerly BP Zimbabwe (Private) Limited (the creditor) for US\$62 139,63 (sixty two thousand one hundred and thirty nine United States dollars and sixty three cent) ("the principal debtor)
- (2) I undertake to pay the money as follows:-
 - 2.1 US\$5 000,00 on or before 15 September 2012
 - 2.2 The balance of US\$57 139,63 in seven (7) monthly payments of \$8 162,80 with the first instalment due on or before 1 October 2012 and thereafter on or before the 1st day of each succeeding month up to 1 May 2013.
 - 2.3 the debtor shall have the right to pay instalments higher than the sum of US\$8 162,80
- (3) I undertake to pay a collection commission of 10% of the principal debt which amounts to US\$6 213,00. I undertake to pay the commission by not later than 1 May 2013.
- (4) I renounce the benefit of the legal exceptions the *non causa debiti*, the *errore*

calculi, the revision of accounts, the no value recorded, and the *beneficium ordinis seu excussionis et divisionis* the meaning and effect of which I am familiar.

- (5) The principal debt shall become due and payable immediately in the event of my insolvency or if I commit an act of insolvency.
- (6) I shall not be released from the debt until the full amount of the principal debt and collection commission is paid in full.
- (7) Any certificate issued under the signature of the creditor or his duly authorized agent that purports to certify the amount due hereunder shall be accepted as *prima facie* proof of such indebtedness and shall have sufficient probative value to enable the creditor to obtain summary judgment or provisional sentence against me in any competent court for the amount stated in such certificate, and I accept the onus of disproving the amount so stated as not being the amount owing.
- (8) I shall not be entitled for any reason whatsoever to withhold or defer payment stipulated in the acknowledgement of debt.
- (9) In the event that I default on the payment of any instalment in terms of clause 2 above, the creditor may take legal action against me without the necessity of prior demand.
- (10) In the event that I default on the payment of any instalment by due date and the creditor ends up instituting legal proceedings against me, then I undertake to pay all legal expenses that the creditor may incur, including attorney and client costs, collection commission and tracing fees. I acknowledge that it shall not be necessary for ZUVA Petroleum One (Private) Limited to give me notice before instituting legal proceedings.

Thus done and signed at Harare on this 31st day of August 2012

TAWANDARUZIVE I.D. No. 29-013045 S 77”

The defendant and two witnesses signed this acknowledgement of debt.

This court was called upon to determine the following issues.

- (1) Whether or not the above acknowledgement of debt is a liquid document and whether or not the defendant is bound by the acknowledgement of debt which forms the plaintiff's cause of action in this matter; and
- (2) Whether or not the defendant ought to pay the costs of this suit on an attorney and client scale.

Order 4 rule 21 of the High Court Rules provides thus:-

“A summons claiming provisional sentence shall state the amount and any interest due by virtue of the said liquid document or other such demand as by virtue of the said liquid document is legally claimable, and shall call upon the defendant to satisfy the plaintiff's claim, or in default to appear before the court at the hour and on the day and at the place stated in the summons to show why he has not done so, and to acknowledge or

deny the signature to the said liquid document or the validity of the claim.”

It is common ground that having signed the above acknowledgement of debt the defendant did not pay any amount in terms of the said acknowledgement of debt. It is also common cause that the defendant does not deny at all that the signature appended to the document on 31 August 2012 was his. He has not even sought to explain why he has failed to satisfy the debt. The document clearly states the amount and interest thereon. It admits of no doubt that the above document is a liquid document.

The defendant sought to raise issues which, in my view, were totally irrelevant with no bearing on the acknowledgement of debt. He sought to rely on two documents dated 10 August, 2011 and 31 July 2012 respectively which clearly pre-dated the above acknowledgement of debt dated 31 August 2012. When the defendant signed the acknowledgement of debt he was quite aware of those two documents and their contents. If he had wanted to include any information from them to be included in the acknowledgement of debt he would have easily done so. The defendant again does not proffer any explanation why he did not do so if he felt any information therein was relevant. Instead he simply proceeded to sign the acknowledgement of debt without demur.

Defendant also attempted to rely on annexure “E” which was not helpful either as it in fact showed an amount greater than that on the acknowledgement of debt.

I associate myself with the sentiments expressed in *Caltex (Africa) Ltd vs Trade Fair Motors and another* 1963 (1) SA 36 (SR) that where the acknowledgement of debt is sufficiently clear and certain and no evidence to the contrary has been given by the defendant, provisional sentence summons will be granted.

In clause 10 of the acknowledgement of debt the defendant undertook to pay all legal expenses that the creditor may incur, including attorney and client costs, collection commission and even tracing fees. That is clear and needs no explanation.

In addition the defendant opposed the granting of provisional sentence when he had no explanation for his failure to honour his obligation in terms of the acknowledgement of debt. His opposition was a clear abuse of this court. In my view, this is a proper case where an award of punitive costs ought to be made.

In the result, I would issue the following order.

It is ordered that:-

- (1) Provisional sentence be and is hereby granted as claimed with an award of costs on an attorney and client scale.

Moyo & Partners, plaintiff’s legal practitioners
Cheda & Partners, defendant’s legal practitioners