ENGEN PETROLEUM ZIMBABWE PRIVATE LIMITED
versus
COSTXAM INVESTMENTS PRIVATE LIMITED
t/a MAKONI SERVICE STATION
and
DENNIS RUTENDO MUTSERIWA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 13 September 2016, 7 December 2016

Opposed Application-Provisional Sentence

Mr. T. Manjengwa, for the plaintiff
Ms. T. Makoni, for the defendants

CHIGUMBA J: This matter involves a summons for provisional sentence in which the following order is sought:

1. Provisional sentence in entered against the defendants jointly and severally in the amount of USD$122 356-00 (one hundred and twenty two thousand three hundred and fifty six United States Dollars) plus interest thereon at the rate of 18% per annum calculated from 31 August 2015 to date of final payment.
2. Costs of suit on a Legal Practitioner –client scale.

Summons for provisional sentence on liquid document' was issued on 9 February 2016. The plaintiff's claim was for provisional sentence in the sum of USD$133 356-00 plus interest at 18% per annum calculated from 31 August 2015, and costs of suit on a higher scale. The plaintiff's claim was based on a written acknowledgement of debt executed by the first defendant, a company duly registered in accordance with the laws of Zimbabwe, on 28 April 2015. The plaintiff averred that the first defendant undertook to settle its indebtedness by 31 August 2015. It averred further, that the second defendant bound itself as surety and co-principal debtor with the first defendant, for its due performance of its obligations in terms of the written

acknowledgement of debt. The rate of interest claimed as well as the scale of costs was agreed in terms of the written acknowledgement of debt. The matter that arises for determination is whether the requirements of provisional sentence have been met, and if so, whether the defendants have proffered a viable defence which militates in favor of the dismissal of the plaintiff's application.

The opposing affidavit was filed of record on 8 March 2016, and deposed to by *Dennis Rutendo Mutseriwa*, the managing director of the first defendant. He does not dispute liability, or the quantum of liability or that he signed the liquid document which the plaintiff seeks to rely on. The defence proffered is that certain credit adjustments were made which were not taken into account when the acknowledgement of debt was signed by the parties. We are told about his noble intentions and expectations of capital cash investments and how all this came to nought. We are told of an agreement that agent's commission be channeled to debt redemption, entered into in January 2015, three months before the acknowledgment of debt and surety ship agreements were signed. We are told that this agreement has reduced the quantum of indebtedness significantly. The defendants' representative avers that as at January 2016, the total amount outstanding is USD$54 545-44, that the acknowledgment of debt is defective, that the debt is not yet due because of a mistake common to both parties, that certain credits were not deducted in its favor, that there was material misrepresentation of the debt figure which caused the parties not to be *ad idem* at the time that the agreement was entered into.

At the hearing of the matter, counsel for the plaintiff indicated that he stood by the heads of argument filed of record, while counsel for the defendants, Ms *Makoni,* made a spirited attempt to persuade the court that there were material disputes of fact regarding the quantum of indebtedness and the intention of the parties or their understanding of the terms of the acknowledgement of debt, at the time of its signature, in April 2015. The law that governs claims brought by way of provisional sentence is settled. Provisional sentence is a summary remedy which provided for in Order 4 Rule 20, of the Rules of the High Court 1971, as follows:

> ***"20. Summons claiming provisional sentence***
> Where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document".

The principles which govern the determination of the merits of an application for provisional sentence are equally settled. The essential elements of the procedure of provisional sentence were captured in the case of *Zimbank* v *Interfin* [1] as follows:

> "…the procedure of provisional sentence allows a creditor armed with a liquid document, to obtain payment of the debt without having to wait for the final determination of the dispute between the parties. Whilst a speedy remedy, provisional sentence is an extraordinary remedy based on the presumption of indebtedness raised by the liquid document. 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".

To succeed in a claim for provisional sentence, I have previously expressed the view that; - a petitioner must allege and show that:

1. The petitioner is a creditor which is in possession of a duly signed and witnessed liquid document.
2. There is a *prima facie* presumption of indebtedness in favor of the petitioner.
3. The petitioner is entitled to be summarily paid without having to wait for resolution of the dispute in the main matter.
4. The petitioner is entitled to a quick and robust remedy.
5. The defendant has failed to discharge the onus on it, to rebut the presumption of indebtedness which is raised by the production of a valid liquid document.
6. The defendant has very poor prospects of success in the main matter; the defence proffered is weak, and not likely to be accepted by the court.

For further elucidation of the essential elements of provisional sentence see *Beki Sibanda v Elisha K. Mushapaidze*[2], *Hicks* v *Dobrisky* 1976 ZLR 218, *Herbstein & Van Winsen The Civil Prcatise of the Superior Courts of South Africa*, 3rd ed, p 541, *Gray* v *Moodliar* 1962 (3) SA 379. It was submitted on behalf of the plaintiff that, provisional sentence is an efficacious remedy which requires that the court adopt a 'robust' approach, especially considering that a defendant always has resort to the protective provisions of the rules, in particular, of r 28, which provides that:

[1] 2005 (1) 114
[2] HH 56/10

28. Rights of defendant when provisional sentence granted
A defendant against whom provisional sentence has been granted may—
(*a*) within one month after the attachment made under a writ of execution issued by virtue of such sentence; or
(*b*) if he has satisfied the judgment without an attachment, then within one month after having done so; cause an appearance to be entered with the registrar to defend the action, and shall notify the plaintiff of such entry. If he fails to do so within the stipulated time, the provisional sentence shall immediately thereafter become a final judgment of the court and the security given by the plaintiff shall *ipso facto* become null and void.

The plaintiff challenged the averments made on behalf of the defendant that there are material disputes of fact in this matter and referred the court to the case of *Rich & Ors* v *Lagerway* [3]. In the case of *Zimbabwe Bonded Fibreglass Private Limited* v *Peech*[4], the court said that:

> "It is, I think, well established that in motion proceedings a court should endeavor to resolve disputes raised in affidavits without hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a bona fide and merely an illusory dispute of fact".

Other cases which have pronounced on the issue of the cogency of evidence that is necessary to establish a real dispute of fact are: *Room Hire Company Private limited* v *Jeppe Street Mansions Private Limited*[5], In *Soffiantini* v *Mould*[6], at p 154, the court said the following:

> "It is necessary to make a robust, commonsense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded by an over fastidious approach to a dispute raised in affidavits".See also *Joosab & Ors* v *Shah*[7], *Lalla* v *Spafford N.O. & Ors*[8], *Masukusa* v *National Foods Limited & Anor*[9]."

[3] 1974 (4) SA 748 (AD) (material disputes of fact whether they are incapable of resolution by means of the evidence which appears in the affidavits filed of record, and the need for the defendant to rebut the presumption raised in a summons for provisional sentence, by showing that the probabilities of success on the liquidity of the document are against the plaintiff)
[4] 1987 (2) ZLR 338 (S) @ 339 C-E
[5] 1959 (3) SA 115 (T) @ 1165
[6] 1956 (4) SA 150E @154,
[7] 1972 RLR 137 (G) @ 138G-H
[8] 1973 RLR 241 (G) @ 243 B
[9] 1983 (1) ZLR (HC)

In the case of *Chinese* v *Alluvial Exploration Services Private Limited*[10] this court said that:

> "It is not all disputes of fact that matter in the determination of applications. It is the material disputes of fact that matter".

To restate the principles which ought to guide a court, in motion proceedings, where the oft heard lament of "there is a dispute of facts which cannot be resolved on the papers" is heard: (I have previously expressed these views in a similar matter *Gumbi* v *Majoni* HC 8460-14)

(a) If it is possible to take a bold and rational approach, which is not overly exacting or picky, and there is no real possibility of being unfair to the other party concerned, the dispute may be resolved on the papers.

(b) If it appears that the submission that there is a material dispute of fact is a deliberate and transparent ploy, which is calculated to delay the resolution of the matter by making it appear to be difficult to do so on the papers, the court must be careful not to allow such a strategy to hamper its effectiveness, or to defeat or delay the resolution of the matter.

(c) If the dispute of fact appears to be one that can confidently be relied on as being genuine, authentic, true and above board, and it is not merely deceptive or false, it is a material dispute of fact which may require *viva voce* evidence for it to be resolved.

(d) If the dispute of fact is one of substance, and has a bearing on the issue to be determined, it is a material dispute of fact which may require viva voce evidence for it to be resolved.

It is my considered view that a dispute of fact regarding the quantum of liability is illusory in provisional sentence proceedings where an aggrieved defendant can always resort to r 28 which allows it to file an appearance to defend which will cause the matter to proceed to trial where the alleged dispute can be resolved. Such a dispute is not genuine in proceedings of this nature, and it is not material to the determination of an application for provisional sentence. A party against whom provisional sentence is claimed, is called upon to satisfy the plaintiff's claim, or 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. See *Zuva Petroleum One Private Limited* v *Tawanda*

[10] HH 13-12

Ruzive[11]. The defendant has not denied that it signed the acknowledgment of debt. It is therefore bound by the caveat *subscriptor* rule. Roughly translated this rule stipulates that "...let the signer beware."

The celebrated author R. H. Christie in his book, *Business Law in Zimbabwe*, at p 67, has this to say on the *caveat subscriptor* rule:

> "The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme. The general rule, sometimes known as the caveat subscriptor rule is therefore that a party to a contract is bound by his signature, whether or not he has read and understood the contract….and this will be so even if he has signed in blank…or it is obvious to the other party that he did not read the document".

See also *Jane Nyika* v *Thembani Moyo & Ors*[12]. In this case defendant has not disputed that the acknowledgement of debt is a liquid document. Of the defences open to a defendant in terms of Order 4, this leaves only one open, that, of disputing the validity of the claim. See *Caltex (Africa) Limited* v *Trade Fair Motors & Anor* [13] where it was held that, where the acknowledgment of debt is sufficiently clear and certain, and no evidence to the contrary has been given by the defendant, provisional sentence will be granted.[14].

Only a *bona fide* defence can defeat an application for provisional sentence. A *bona fide* defence has been held to be: "…a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a bona fide defence. He must allege facts which if established, would entitle him to succeed". See *Kingstons Limited* v *L. D. Innerson Private Limited*[15]. It is my view that the defendants have failed to present a plausible case in their defence, entitle them to defeat plaintiff's claim for provisional sentence. The defendants are bound by the authorized signatory's signature, and and by the terms, not only of the acknowledgment of debt, but of the surety ship agreement and signature. There is insufficient and incomplete evidence that the

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[11] HB 32-14

[12] HB 145-10

[13] 1963 (1) SA 36 (SR)

[14] HH 29-12

[15] SC 8-06

principal debt is only USD$54 000-00. Again caveat subscriptor. The defendants signed a contract in which they expressly agreed that the principal debt was as claimed in the summons.

We therefore find that the plaintiff has discharged the onus on it and shown on a *prima facie* basis that it is entitled to provisional sentence as claimed in the summons. The defendants have no *bona fide* defence to the plaintiff's claim. They have failed to rebut the presumption of indebtedness raised in the acknowledgment of debt and in the surety ship document. The question of quantum is one for trial and may properly be ventilated by utilizing the provisions of Order 4 of the rules of this court. The court is satisfied that this is a proper case where provisional sentence may be granted in favor of the plaintiff. In the result it is hereby ordered that:

7. Provisional sentence in entered against the defendants jointly and severally in the amount of USD$122 356-00 9one hundred and twenty two thousand three hundred and fifty six United States Dollars plus interest thereon at the rate of 18% per annum calculated from 31 August 2015 to date of final payment.
8. Defendants shall pay costs of suit on an ordinary scale.

Messrs. Makoni Legal Practitioners, applicant's legal practitioners
Messrs. Wintertons, respondent's legal practitioners