JOHN MASEKO
versus
NOMUSA NDLOVU

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 4 FEBRUARY AND 11 FEBRUARY 2016

Provisional Sentence

J. Matshakaile for the plaintiff
N. Mazibuko for the defendant

MATHONSI J: The plaintiff seeks provisional sentence against the defendant in the sum of $6 606-48, which itself falls squarely within the jurisdiction of the magistrates court, but has been brought to this court for unknown reasons. Of course the plaintiff asserts that he is entitled to bring the claim to this court because the magistrates court's jurisdiction is limited to a claim of not more than $5000-00, a clear case of persistence in ignorance even after an objection on jurisdiction was made.

The plaintiff's claim is based on a handwritten document signed by the defendant on 14 June 2014 before three witnesses who have not been called upon to submit affidavits on the circumstances under which the document was signed even after the defendant alleged that undue influence was brought to bear upon her to sign the document.

Be that as it may, it is still necessary to relate to that document from the very outset as the issue for determination is first and foremost whether it is indeed a liquid document as would found a claim for provisional sentence in terms of rule 20 of the High Court of Zimbabwe Rules, 1971. It reads:

> "14/6/2014
> AGREEMENT DONE BETWEEN JOHN MASEKO AND MS NOMUSA NDLOVU
>
> I NOMUSA NDLOVU ID 84-024712H-39 hereby that (sic) I would settle $600-00 for rental outstanding to Mr. John Maseko. I will also settle the City of Bulawayo arrears of $350-00. I will also settle the Zesa bill in liaising (sic) with Mr. B. Masuku until the installation of the pre-paid meter. I promise to pay the rental on payment terms of $500-

> 00 on the 21 June 2014 onto Mr. J Maseko (sic) accountant. Balance on $100-00 on the 25 June 2014.
>
> I promise that any default of payment will authorize Mr. J Maseko to auction and sell the goods on the inventory."

As I have said, the document is signed by witnesses but is a photocopy and not an original. In addition to the said document, the plaintiff has attached a Zesa bill addressed to I. Maseko of P26 Mzilikazi Bulawayo for account number 5028074 dated 18 August 2014. It shows an outstanding balance of $5137-63.

He has also attached a City of Bulawayo bill dated 27 August 2014 addressed to Mr. J Maseko at P26 Mzilikazi Bulawayo on account number 700381179. It shows an outstanding balance of $468-85. It is those three documents which form the basis of the suit for provisional sentence.

The defendant filed an opposing affidavit denying liability or the existence of a lease agreement between herself and the plaintiff. Instead, she states that it is her estranged husband, a relative of the plaintiff, who has a lease agreement with the plaintiff and that she was claiming occupation of house number P26 Mzilikazi Bulawayo through her husband. The latter was obliged to pay a monthly rental of $200-00 to the plaintiff. The husband deserted the family at some stage only to return in the company of the plaintiff to threaten her for being in arrears. They forcibly confiscated her property which they locked away. Ill and scared of being thrown out of the house or being arrested, the defendant says she was forced to sign the document I have referred to above, which was signed under duress.

The defendant maintains that the document is not a liquid one as it does not state the amount of $5 137-63 being claimed for electricity or the amount of $468-85 for the municipality bill. She says she paid everything that was owed to the plaintiff before vacating the rented premises in September 2014. The plaintiff's answering affidavit is not helpful at all in resolving the issue.

Let me begin by making reference to the words of the learned authors Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, third edition, Juta & Co Ltd at page 541 that:

> "The essence of the procedure then and now is that it provides a creditor who is armed with sufficient documentary proof (a liquid document) with a speedy remedy for the recovery of the money due to him without having to resort to the more expensive, cumbersome and dilatory machinery of an illiquid action. The procedural method of provisional sentence is no magic wand to be used to disarm prospective defendants or dispel all opposition thereto, but is a well-recognised, long-standing and often-used mode of obtaining speedy relief where the plaintiff is armed with a liquid document. The purpose of provisional sentence proceedings is to enable the plaintiff to receive prompt payment without having to wait for the final determination of the dispute between the parties."

In terms of rule 20 of the High Court Rules, 1971, where the plaintiff is the holder of a valid acknowledgment of debt, commonly known as a liquid document, he may issue summons for provisional sentence based on that document. That is what the plaintiff has sought to do but the validity of that document has been put in issue. Unfortunately, the term "liquid document" has not been defined in the rules providing for provisional sentence. However, from decided cases, certain broad principles have evolved in respect of the grant or otherwise of provisional sentence based on a liquid document. They are that:

1. Any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document (*Sibanda* v *Mushapaidze* 2010 (1) ZLR 216 (H) 218 E-F.)
2. A liquid document which, on the face of it speaks unequivocally, must have the story of the transaction behind it as an investigation into the story may show that the defendant is not liable in terms of the liquid document. (*Allied Holdings Ltd* v *Myerson* 1948 (2) SA 961 (W) at 968.
3. If the court has to go behind the liquid document the onus is on the defendant to show that if evidence is heard the probabilities are that he would succeed. (*Allied Holdings Ltd* v *Myerson, supra*)
4. Where the legality of a document is called into question, as when the document may be tainted with illegality, the court has to decide whether to let the loss lie where it falls or to relax the rule against illegal agreements in order to do justice between the parties, such an inquiry cannot be made at provisional sentence stage but can only be determined at the trial of the matter (*Matsika* v *Jumvea Zim (Pvt) Ltd and Another* 2003 (1) ZLR 71 (H); *Sibanda* v *Mushapaidze, supra.)*

5. Where the defendant denies that the signature on a document is his or that of his agent, the onus is on the plaintiff to prove that the signature is his (*Donkin* v *Chiadzwa* 1987 (1) ZLR 102 (H).
6. It would be a travesty of justice if the court were to grant provisional sentence on the strength of vague, confusing and unclear documents whose authenticity has been questioned (*Briggs* v *Billiati and Another* HH 749/15.)

Relating to the present matter, the documents relied upon by the plaintiff are equivocal, unclear and ambiguous and certainly do not represent a straight forward promise to pay by the defendant apart from the fact that she alleges duress before signing the said document. In the document signed by the defendant she promises to pay the sums of $600-00 and $350-00 which add up to $950-00 and not the $6606-48 the plaintiff is claiming. Therefore the document cannot possibly be said to be liquid to the extent that the plaintiff's claim is concerned.

In order to arrive at the amount he is claiming the plaintiff has had to rely on extrinsic evidence in the form of Zesa and Municipality bills which are not cited in the acknowledgement of debt and are completely unrelated to the promise to pay. In the first place, regarding the municipality bill, the defendant did not acknowledge the sum of $468-85 contained in the bill. Regarding the Zesa bill, she did not undertake to pay the sum of $5137-63 contained in the bill.

In the second instance, the extra evidence of the bills produced by the plaintiff to justify the claim is unrelated both in terms of time and in terms of the names of the account holder. The Zesa bill is in the name of I. Maseko whose identify is unknown and was issued on 18 August 2014 when the acknowledgment of debt was signed with John Maseko on 14 June 2014. The City Council bill is indeed in the name of J. Maseko but was issued on 27 August 2014. Clearly therefore those documents are not contemporaneous and as such even if one were to stretch the imagination to elasticity limit, it cannot be said that on 14 June 2014 the defendant was acknowledging indebtedness in respect of those two bills. It is trite that the need for extrinsic evidence to substantiate a document invalidates that documents liquidity.

The moment it becomes apparent that in order to prove liability in the amount claimed the plaintiff would have to lead more evidence either to explain the contents of the document or to justify the amount claimed, the document ceases to be liquid. The plaintiff must therefore desist from seeking provisional sentence based on such a document. It is the height of

irresponsibility to just forge ahead in the pursuit of the remedy of provisional sentence in the hope that the court will piece together evidence contained in various documents not signed by the defendant in acknowledgment of indebtedness and completely unrelated. Doing that would amount to making a case for the plaintiff which is not contained in a liquid document envisioned by rule 20.

The plaintiff's woes do not end there. The defendant has alleged that there was no contractual relationship between the parties as would visit her with liability for rent, electricity and water bills. Such a relationship was between the plaintiff and her husband. Added to that is the allegation of duress. That constitutes a defence which has to be interrogated. In the words of PRICE J in *Allied Holdings Ltd* v *Myerson, supra* at 968;

> "It is recognized, of course that a liquid document which on the face of it speaks unequivocally, must have the story of the transaction behind it and that an investigation into that story may show that the (defendant) is not liable in terms of the liquid document; but once we go behind the liquid document, the onus is on the defendant to show that if evidence were heard the probabilities are that he would succeed."

I am satisfied that if one were to go behind the document, and investigate the story presented by the defendant regarding liability and duress especially in light of the fact that her goods were confiscated, the defendant may succeed. All that however cannot be decided at provisional sentence stage. The determination of those issues would have to be reserved for trial.

That therefore resolves the matter. I would not countenance granting provisional sentence in the circumstances. *Mr Mazibuko* for the defendant asked for the dismissal of the plaintiff's claim by reason that the plaintiff adopted the wrong procedure. He submitted that a dismissal of the provisional sentence summons is implied in rule 34 of the High Court Rules. I do not agree. Rule 34 provides:

> "Where provisional sentence has been refused and the case has been ordered to stand over for trial, the summons shall stand as a summons in an ordinary action and the defendant shall enter appearance within five days of the court's judgment, and thereafter the rules for procedure in an ordinary action shall apply unless the court gives other directions."

That rule does not provide for a dismissal of the action where provisional sentence is refused and a dismissal cannot possibly be implied. Such a construction accords with the fact that provisional sentence proceedings are interlocutory in nature. The summons is like any other

summons. As such, the proper approach would be to stand the matter over for trial where provisional sentence is refused.

I however agree with *Mr Mazibuko* that the claim for provisional sentence was so hopelessly without merit and unwarranted that there must be consequences to the plaintiff for adopting the wrong procedure, a process which has put the defendant unnecessarily out of pocket. In that regard the plaintiff should bear the defendant's wasted costs.

In the result, it is ordered that;

1. Provisional sentence is hereby refused.
2. The matter is hereby stood over for trial with the summons for provisional sentence to stand as a summons in an ordinary action.
3. The defendant shall enter appearance to defend the action within five (5) days of this order.
4. The plaintiff shall bear the defendant's wasted costs.

Ndove, Museta & partners, plaintiff's legal practitioners
Calderwood, Bryce Hendrie & Partners, defendant's legal practitioners