

GULA-NDEBELE AND PARTNERS
LEGAL PRACTITIONERS
versus
AG-VENTURE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 28 June 2011 and 8 February 2012

Provisional Sentence – Opposed

P Kadembo, for the plaintiff
B Furidzo, for the defendant

MAVANGIRA J: The plaintiff issued a summons for Provisional Sentence on a liquid document claiming from the defendant an amount of US\$10 500-00. The plaintiff averred that its claim is based on a letter dated 27 July 2009 executed by the defendant's accountant acknowledging the debt due. The letter states that an amount of US\$15 000-00 is payable to the plaintiff. The letter also states "We wish to pay yourselves \$500-00 weekly or US\$2 000-00 a month."

The plaintiff avers that the defendant has only paid a total of US\$4 500-00 by way of weekly instalments and has thereafter defaulted on paying the weekly instalments to it. The plaintiff contends that the letter signed by the defendant's accountant constitutes an acknowledgement of debt by the defendant and is therefore a liquid document as contemplated in r 20.

The defendant filed an opposing affidavit. It states therein that sometime in 2008 it instructed two law firms, being the plaintiff and Mudambanuki & Partners to do some legal work for it. The plaintiff then drafted the Mandate letter, annexure "A" setting out the work to be done and the legal fees payable. It is stated that the said Mandate letter was never signed because the defendant did not agree with the scope of work to be done. It also did not agree with the legal fees payable.

It is also contended by the defendant that even if it were to be said that the work set out in the Mandate letter is what the parties agreed on, which the defendant denies, most of the work referred to in the Mandate letter was not done. The defendant however admits that some legal work was done but denies that the work done by the plaintiff justifies legal fees

that amount to US\$15 000-00. It is contended that the amount payable still has to be agreed on whilst also taking into account that the plaintiff was to get 70% of the fees whilst Mundambanuki & Partners were to get paid 30% thereof.

The defendant's opposing affidavit also states that the letter that was written by the defendant's accountant and which the plaintiff is relying on was written by the accountant without the defendant's authority. It is further stated that in any event, even if it were to be accepted that the letter is binding, which the defendant denies, the offer therein was never accepted by the plaintiff. It is further stated that the letter does not in any event give the plaintiff the right to claim the entire outstanding balance in the event of a default and that the defendant had paid to the plaintiff US\$5 000-00 in addition to Z\$625 000 000 000-00 which the defendant paid in May 2008.

The defendant prays for the dismissal of the plaintiff's claim with costs. Rule 20 of the High Court rules provides as follows:

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

In *casu* the plaintiff relies on the letter by the defendant's accountant as a liquid document forming the basis of its summons for provisional sentence. In *Rich & Ors v Largerwey* 1974 (4) SA 748 at 745 (H) WESSELS JA stated:

“If the document in question, upon proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto, is an unconditional acknowledgment in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted.”

The letter by the defendant's accountant states:

“We would like to offer a payment plan with regards to the above mentioned invoice amounting to US\$15 000-00. (Fifteen Thousand United States dollars). The harsh economic environment we were experiencing has had a negative impact on our business and therefore we were unable to settle our debt in full.

We wish to pay yourselves US\$500-00 (Five hundred United States dollars) weekly or US\$2 000-00 a month. However the said amount will be revised as soon as our cash flow improves.”

On a perusal of the contents of the letter it would appear to me that the letter is a liquid document. It is an unconditional acknowledgment of indebtedness in an ascertained

amount of money the payment of which is due to the applicant. This is all evidenced by the terms of the letter upon proper construction of it and without resort to evidence extrinsic thereto.

The defendant contends that the accountant did not have its mandate to write the letter. Reference has been made to *Donkin v Chiadzwa_1987* (1) ZLR 102 at 103 G where MTAMBANENGWE J stated:

“The law as I understand it from the reading of the authorities on the point, is that if the defendant denies that the signature of the document is that of himself or his agent or denies the authority of his agent, the *onus* would be on the plaintiff to establish these facts: See Hebstain and van Winsen *Civil Practice of the Superior Courts in South Africa* 3rd ed at p555 (part paragraph) – 556.

In *casu*, subsequent to the letter by the accountant the defendant made nine payments in terms of the payment proposal stated in the letter up to a total of US\$4 500-00 and thereafter defaulted on its payments. The defendant therefore by its conduct created the impression that the accountant had the authority to write the letter. In any event, as submitted by the applicant’s legal practitioner, s 12(C) of the Companies Act, [*Cap 24:03*] provides that anyone deriving title from a company shall be estopped from denying that a representative of the company has been duly authorised and has authority to exercise the functions customarily exercised by an officer or agent in his positions. The section provides:

“12 Presumption of regularity

Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth –

...

(c) that every person whom the company, acting through its members in general meeting or through its board of directors or its manager or secretary, represents it to be an officer or agent of the company, has been duly appointed and has the authority to exercise the functions customarily exercised by an officer or agent of the kind concerned.”

In my view, for the above reasons, the accountant acted within the scope of her office and the defendant is estopped from denying that she had the mandate or authority to write the letter. The fact that the defendant made some payments in accordance with the terms stated or proposed in the letter assists in disposing of the defendant’s contention.

It was Mr *Furidzo*'s submission that s 10(1)(b) of the Exchange Controls Regulations, 1996 was contravened and thus the plaintiff's claim cannot be enforced. Miss *Kadembo*'s response was that the basis of the plaintiff's claim is not annexure A, the Mandate letter but is the acknowledgment of debt, the letter of 27 July 2009 by the defendant's accountant and that consequently Mr *Furidzo*'s submission was of no consequence to the plaintiff's claim.

In *casu* annexure A the Mandate letter was not signed by any of the parties. Furthermore, it was addressed to the Managing Director of Deicov Holdings (Private) Limited and according to the last page thereof it was to be signed by the plaintiff's representative; a representative of Mudambanuki & Associates and a representative of Deicov Holdings (Pvt) Ltd. Neither Deicov Holdings (Pvt) Ltd nor Mudambanuki & Associates are parties to the matter before this court. The defendant in the matter before this court does not feature in any way within A. It therefore appears to me that Annexure A is of no relevance to this matter. No reliance will therefore be placed on it in the determination of the matter.

Having already found earlier for reasons already discussed, that the letter by the defendant's accountant is a liquid document which was written with the defendant's authority, it appears to me that para 7 of the defendant's opposing affidavit is not supported by the facts or evidence placed before this court. In para 7 the defendant states *inter alia*:

"Whilst the defendant admits that there is some legal work that was done and that there are some legal fees that are due to the plaintiff, it denies that the work done by the plaintiff amounts to \$15 000-00. The amount payable should be agreed on ..."

The net result of the evidence before this court is that the defendant accepts that some legal work was done for it by the plaintiff and that there are some legal fees that are due to be paid by it to the plaintiff. There is also evidence before this court in the form of the letter of 27 July 2009 that the defendant acknowledged owing US\$15 000-00 to the plaintiff. There is also evidence that after the letter of 27 July 2009, the defendant proceeded to make payments up to a total sum of US\$4 500-00 leaving an outstanding balance of US\$10 500-00. It is this amount of US\$10 500-00 on which the plaintiff seeks a provisional sentence order.

I see no reason or justification for denying the plaintiff the relief that it seeks. Neither do I see any reason for denying the plaintiff's claim for award of costs on the higher scales, on the facts before me.

In the result it is ordered as follows:

IT IS ORDERD THAT

The plaintiff's claim for provisional sentence in the sum of US\$10 500-00, with costs on the legal practitioner and client scale together with interest thereon at the rate of 5% per annum reckoned from 27 October 2009 to date of final payment, be and is hereby granted.

Gula-Ndebele & Partners, plaintiff's legal practitioners
Kanokanga & Partners, defendant's legal practitioners