MACASAVE INVESTMENTS (PVT) LTD
versus
ZIMBABWE MINING DEVELOPMENT CORPORATION

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 22 September 2020 and 19 January 2023

Summons for provisional sentence

Ms *S Dizwane*, for the plaintiff
Mr *J R Tsivama*, for the defendant

CHINAMORA J:

Background facts

This is a simple case for summons for provisional sentence anchored on an alleged acknowledgment of debt executed, on 14 February 2017, by one Dr K Karonga, as General Manager of the respondent in this case. It will be necessary in this case to reproduce the document that has given rise to the dispute between the parties. I do so hereunder:

> **"Re: ACKNOWLEDGEMENT OF DEBT- MACASAVE INVESTMENTS (PVT) LTD**
>
> The corporation has made a careful search of its records but did not locate a capex application for the core drill rigs. However, during the search exercise documentation pertaining to the Macasave transaction were also retrieved. The main documentation of substance retrieved was:
>
> 1. The Report on Procurement of Exploration Drilling Equipment by ZMDC for the MPC from Macasave (Pvt) Ltd dated January 2014 written by the then Manager MPC, Mr D Chatora.
> 2. The then General Manager J N Ndlovu's email to his financial staff at the HQ dated 12 June 2013.
> 3. Report on the assessment of Core Drill Rig Equipment at Macasave dated November 2012 authored by Mr D Chatora.

After perusing the above documentation, it came to our attention that the sum total prevalent in the report was $4,000,000 (four million dollars) as a consequence we can only acknowledge a debt of $4,000,000 less the $1,9 million paid by ZMDC. This then implies ZMDC nay be liable to Macasave for $2, 1 million.

We stay available for further interaction with yourselves regarding the matter.

Yours faithfully

Dr F Karonga
GENERAL MANAGER"

Having been served with the summons commencing action based on the above-referred acknowledgment of liability, the defendant decided to oppose it. The basis of the opposition is multi-faceted. There are serious allegations raised against Dr Karonga who signed the acknowledgment on behalf of the respondent. The allegations range from impropriety on the part of the respondent's then General Manager or Acting Manager. I say this because when the acknowledgment of debt was signed, Dr Karonga gave himself out as the General Manager of the respondent. However, the deponent to the notice of opposition, Tinashe Collins Chiparo (hereinafter called "Chiparo"), who incidentally is now the Acting General Manager says at the time Dr Karonga was "only" a General Manager. Clearly, the deponent has no respect for Dr Karonga. Additionally, it is alleged that when the events relating to the claim occurred, Dr Karonga was not employed by the respondent. Dr Karonga is accused of blindly accepting liability without consulting his colleagues who included the deponent. The allegations got worse when Dr Karonga was accused of possible connivance with the plaintiff, or gross negligence in the performance of his duties. Chiparo states that the incompetence led to the termination of his employment with the respondent. I must state that there is no confirmation of these allegations which has been placed on record.

Further to this, Chiparo asserts that the defendant did not owe anything to the plaintiff and that, if anything, it is the plaintiff who should refund the defendant of a sum in excess of US$500,000 as it paid plaintiff more than the fair market value of the property due to undisclosed *political pressures*. Ms Dizwane for the plaintiff, submitted that this allegation cannot be sustained, because this court cannot make a finding of duress by an unnamed faceless third party.

I will return to comment on this later in this judgment. It is important to observe that there is no evidence that these issues were raised with the plaintiff before these proceedings were initiated. There is even a suggestion in the notice of opposition that, in or about December 2012, the defendant carried out a valuation of the property concerned and put its value at US$1,368,277 and not US$4,000,000 which appears in the acknowledgment of debt. It is inevitable to note that Chiparo's catalogue of allegations against Doctor Karonga is endless. Later in this judgment, I will come back to analyse these allegations in the context of the acknowledgment of debt.

The legal position on provisional sentence

I propose at this stage to briefly focus my attention to the legal position which regulates the issue of summons for provisional sentence on a liquid document. Mr Tsivama who appeared for the defendant and leaning on rule 223 of the old High Court Rules, 1971, read that rule to mean that once a notice of opposition has been filed like in the instant case the hearing must be aborted and have the matter referred to the opposed roll. Counsel read or interpreted that rule to mean that only uncontested cases for provisional sentence may be set down for determination in the unopposed roll. Mr Tsivama relied on the observations made by my brother ZHOU J in the case of *Al Shams Global BVI Ltd* v *Equity Properties (Pvt) Ltd* 2013 (2) ZLR 131, when he stated:

> "It seems to me, however, that the rules do not have provision as regards the setting down of cases for provisional sentence, at least in relation to the unopposed roll. Order 223(1)(a) provides for the setting down of uncontested cases for provisional sentence on the roll for unopposed matters ... There is no provision in the rules for contested cases for provisional sentence to be set down on the same roll. The setting down of contested cases for provisional sentence on the "unopposed" roll is, therefore, not in accordance with the provisions of the rules..."

Ms Dizwane who appeared for the plaintiff, held a completely different view on the handling of claims for provisional sentence which he argued are regulated in terms of both the common law and the Rules of this court. He argued that Order 4 of the old High Court Rules, empowers any plaintiff who is a holder of a liquid document to issue out in order to secure a speedy relief. Regarding summons for provisional sentence, Counsel went on to state that at this stage the merits of the case are secondary in proceedings of this nature. To buttress his argument he relied on the case of ZIMBANK v *Interfin Merchant Bank of Zimbabwe* 2005 (1) ZLR 114 (H), where the learned judge, MAKARAU JP (as she then was) had this to say:

> "In order to resolve the above issue it is important to understand what the remedy of provisional sentence entails. My understanding of the remedy of provisional sentence is for the plaintiff who is a holder of a liquid document to secure speedy relief. Unlike summary judgment such relief is not final in nature. The defendant is still free to defend the matter once he has acted in terms of the provisional sentence".

This position of our law was restated by MATANDA-MOYO J in *Eastring Investments (Pvt) Ltd* v *Defurb Investments (Pvt) Ltd and Anor* HH 830-16 in the following manner:

> "Provisional sentence is a special procedure designed to give a plaintiff who is a holder of a liquid document and *prima facie* proof of his claim speedy judgment without the expense and delay that ordinary trial action entails"

The rationale for this pronouncement is self-commending. For this reason and with due deference to my brother ZHOU J, I am more inclined to follow the *ratio* enunciated by MAKARAU J (as she then was). Her approach recognizes the special nature of provisional sentence and the fact that even after it has been granted, the defendant would still enjoy an opportunity defend his position as the order is not a final one but as its name suggests, a provisional one, subject to final confirmation.

Let me comment on the issue of opposition to provisional sentence. I do not share the sentiments that once a notice of opposition has been filed in a summons for provisional sentence, the Court must be cow down to abort the hearing of the matter on the unopposed roll. This is partly because even in very clear cases where there is an acknowledgment of liability on a liquid document, there will always be litigants who will attempt to come up with fanciful defences. This court has had occasion to pronounce on this. In *Zimbabwe Leaf Tobacco Company (Pvt) Ltd* v *Cooke* HH 829-16, MATANDA-MOYO J appositely remarked:

> "To automatically refer the matter to the opposed roll without the court making a finding that the defendant has, a defence to be canvassed is to undermine or take away the remedy. My understanding is that the court on the date of set down should hear the parties, especially the defendant. If the defendant's defence is such that the matter can be resolved either way, the court should thereat dispose of the matter. If the defence raised by the defendant requires further filing of papers by the parties the court can either refer the matter to the opposed roll or to trial if the facts are not capable of resolution on papers. This can be done where the defendant produces sufficient proof on affidavit to show that the probability of success in the principal case favours the defendant *see Froman* v *Robertson* 1971 (1) SA 115 A at 120B".

I share the same sentiments. The focus must be whether after all has been considered, it can be concluded that the plaintiff is a holder of a legitimate liquid document. Therefore, the filing of an opposition to provisional sentence summons should not in any way preclude the court from making this enquiry. In fact, this seems to me to be an approach driven by common sense.

Analysis of the case

Having spelt out the legal position as perceived I now wish to deal with the acknowledgment of debt *vis-à-vis* its opposition. The straight view that I take without any laborious effort is that the acknowledgment of debt on the face of it satisfies all the requirements of a liquid document. One does not struggle to ascertain the amount forming the quest for provisional sentence. The document sufficiently gives the background of the debt and the efforts made to verify the debt in issue, after which it specifies the amount in issue. It seems inconceivable that Dr Karonga, who acknowledged the debt could have laboured to go through the extensive effort he made to ascertain the debt as canvassed in the acknowledgment itself so that he could cheat his organization. Dr Karonga is criticized for having single-handedly committed the defendant to the debt of US$2.1 million dollars, yet the wording of the document suggests that he consulted others because he concludes the document as follows:

> "After perusing the above documentation, it came to our attention that the sum total prevalent in the reports was us $4000 000 ... as a consequence we can only acknowledge a debt of US$ 4 million less the $19 million paid by ZMDC...." **[My own emphasis]**

To me, this is contrary to what Chiparo suggests, which is confirmation that there was research and consultations made before the debt was acknowledged. I find the whole affidavit of Chiparo condescending and an attempt to delay the day of reckoning in as far as the payment of the debt is concerned. For example, the deponent goes to town about condemning everything done by Dr Karonga despite the letter head explicitly showing that he was one of the directors of the defendant. In addition, Chiparo raises issues of possible connivance and or corruption on the part of Dr Karonga without providing proof of such serious allegations.

I now return to deal with the allegation of duress. The *onus* to prove the undue influence was on the defendant based on the age old principle of *"he who alleges must prove"*. See *ZUPCO* v *Packhorse Services (Pvt) Ltd* SC 216-13. The requirements for duress are settled in this jurisdiction and South Africa, and I need only rely on the decision in *International Export*

Trading Company Zimbabwe (Pvt) Ltd v *Mazambani* HH 195-17, where DUBE J (as she then was) stated:

> "…a litigant wishing to rely on duress and undue influence as a ground for resisting enforcement of an acknowledgement of debt ("AOD") must do more than just allege that he was forced to sign the AOD. He must convince the court that the pressure applied upon him to coerce him to sign was so extreme or severe so as to negative voluntariness and induced him to sign the document without his free will. The influence averted to must be shown to be unscrupulous and that it weakened his power to resist. Further, that he would ordinarily not agree to the signing. He must show that he protested and took steps to avoid the forced action or contract. The threats alleged must be proved to be the motivation for the signing and the threat must be of some imminent or an inevitable evil. The defendant's fear must be reasonable. **[My own emphasis]**

I fully endorse the learned judge's exposition of the law. The approach under South African law is the same, and it is relevant to refer to *Patel* v *Grobbelaar* 1974 (1) SA 532 (AD). In light of the standard set by the authorities I have referred to, I find that the allegation of duress was not substantiated, which means the acknowledgment of debt cannot be faulted on the ground of undue influence.

Generally, in the absence of evidence to show that the acknowledgment of debt is invalid or was signed owing to undue influence, the relief should be afforded. This was emphasized by this court in *Caltex (Africa) Ltd* v *Trade Fair Motors and Anor* 1963 (1) SA 36 (SR), where the court stated that if the acknowledgment of debt is sufficiently clear and certain and no evidence to the contrary has been provided, provisional sentence will be granted. I come to the conclusion that the acknowledgment of debt is clear in all material respects, and the relief sought must be afforded.

Disposition

In the result, it is hereby ordered as follows.

1. Judgment for provisional sentence in the sum of US$2,100,000, be and is hereby granted against the defendant.
2. The defendant shall pay costs of suit.

Hove Legal Practice, plaintiff's legal practitioners
Sawyer & Mkushi, defendant's legal practitioners