

LINDA CHIKONO
versus
VIMBAI MADAMOMBE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 8 October 2024 and 17 March 2025

Application for Summary Judgment

T A Mandizvidza, for the applicant
A Masango, for the respondent

TAKUVA J: This is an application for summary judgment in which the applicant seeks the following relief:

- “1. The application for summary judgment be and is hereby granted.
2. The respondent pays the applicant the sum of US\$19700.00 (nineteen thousand seven hundred United States Dollars).
3. The respondent shall pay interest at the rate of 5% per annum from the date of the issue of summons to date of full payment.
4. The respondent shall pay costs of suit on an attorney and client scale.
5. The respondent to pay for collection Commission in terms of the Law Society of Zimbabwe by laws.”

BACKGROUND FACTS

On or about the 20th July 2023, the respondent borrowed US\$20 000.00 from the applicant. The respondent executed an acknowledgment of debt confirming her indebtedness. She duly signed the acknowledgment freely and voluntarily before a witness on the 22nd July 2022. See Annexure A.

The respondent has breached the terms of the acknowledgment of debt in that she has failed to pay the full amount owing within two weeks of being called upon to do so, but only paid a sum of US\$300.00 and despite demand, she has failed, refused for neglected to pay the amount owing in full. On 28 April 2023, applicant instituted action proceedings against respondent for the

payment of the outstanding balance and other claims. The summons were duly served and respondent entered appearance to defend the action on 9 May 2023.

Applicant's case

It is applicant's submission that the appearance to defend is not backed by a genuine *bona fide* defence to the claim on the merits in the main matter but has been entered with a sole intention of delaying the finalisation of this matter and thereby frustrating applicant in her efforts to recover what is due to her.

Further, applicant submitted the above belief is based on the following facts:-

- (a) Respondent acknowledged indebtedness in the presence of a witness.
- (b) Respondent has breached the terms of this acknowledgment.
- (c) Respondent acceded to an award of punitive costs in the event of applicant taking legal action to recover her money in terms of clause 7 of the acknowledgment of debt as well as the suretyship agreement.

Respondent's case

1. Respondent submitted that she signed the acknowledgment of debt under duress after applicant threatened to have her arrested.
2. That no demand for payment was ever made by applicant – not put in mora.
3. That it is illegal to claim collection commission.
4. That she paid a total of US 3900.00 to applicant's friend one Mudzingwa on 28 July 2022.
5. That the acknowledgment of debt is illegal and unenforceable as it violates the peremptory provisions of the law that the Zimbabwean dollar is the sole legal tender.
6. It also violates the provisions of the Finance Act (No 2) 2019 which expressly banned the use of the Zimbabwean Dollar.
7. The acknowledgment of debt is therefore illegal in so far as it refers to United States Dollars which is not a legal tender.
8. That respondent has raised a *bona fide* and arguable defence both on facts and law. The amount of US\$19700.00 is not the correct outstanding amount.
9. The summons itself is also invalid at law as the claim is expressed in US Dollars

The Law

Summary judgment is provided for in r 30(1) of this court's rules 81 202 of 2021. The rule states:-

“30(1) where the defendant has entered appearance to defend, the plaintiff may, at any time before a pre trial conference is held make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.”

In *Bank of Credit and Commerce Zimbabwe Ltd v Jani Investments (Pvt) Ltd* 1983(2) ZLR 317(HC), the court remarked as follows:-

“It is true summary procedure is the principal means by which unscrupulous litigants seeking only to delay a just claim by entering appearance to defend, are thwarted. It is thus of the greatest importance that the efficacy of the procedure should be unimpaired by technical formalism.”

See also *Bronson v Bronson* HB 42-20 *Majoni v Ministry of Local Govt and National Housing* 2002(1) ZLR 148(S).

In order to defeat an application for summary judgment, a respondent must set forth a *bona fide* defence with sufficient clarity and completeness to enable the court to decide whether the opposing affidavits disclose facts, which if approved at trial, would entitle the respondent to succeed- See *Kingston Ltd v Inesons (Pvt) Ltd* 2006(1) ZLR (SC) at 458-459 A.

It is trite that not every defence will defeat an application for summary judgment. See *E G Construction (Pvt) Ltd v Faramatsi Motors (Pvt) Ltd* HH 356/20.

As regards duress a contract signed under duress may be voided by the innocent party. To prove duress, the innocent party must establish the following;

- (a) A threat of considerable evil to him or his family (whether or not the family limitation makes sense is debatable);
- (b) Actual violence or reasonable fear;
- (c) An imminent threat or inevitable evil;
- (d) The threat or intimidation was unlawful or *contra bonos mores*;
- (e) That the contract was conducted as a result of duress – see *Corbett J's commends in Arrend and Ano v Astra Furnishers (Pvt) Ltd* 1 All SA 522(C)1974 8A 298(C).

It is not necessary that the threat be by express words or deed. Like misrepresentation, it may be implied, tacit or by conduct, and may also, like extortion, consist in more subtle forms of intimidation.

As regards the Answering Affidavit, Mr Masango submitted correctly in my view, that it was improperly before the court and ought to be expunged from the record. I agree. Applicant violated r 30(7) of SI 202 of 2021 by filing an answering affidavit without the court's permission in accordance with proviso (c) to subrule 7 of r 30. The court can not sanitise or simply rubber stamp an irregular pleading. In the result the "Answering Affidavit" filed by the applicant is here by expunged from the record.

Analysis

There are basically two issues for determination namely;

1. Whether or not the applicant's claim is invalid and in contravention of the law, and
2. Whether or not the applicant is entitled to summary judgment.

As regards the first issue, I take the view that the respondent is mistaken as to the meaning of SI 85/2020. In terms of this Statutory Instrument, it is permissible for any person to pay for goods and or services chargeable in Zimbabwe Dollars in foreign currency using his or her free funds at the prevailing bank rate on the date of payment. In other words, the respondent is at liberty to pay the total sum of US\$19700.00 at the prevailing bank rate at the time of settlement of the capital debt.

Consequently, the respondent's argument that the Zimbabwe dollar is the sole legal tender is a misconception. What this means is that the respondent does not have a *bona fide* defence as the fact that the draft order is denominated in United States Dollars does not render the summons inconsequential.

In any event, the final wording of any court order whether final or provisional is the sole prerogative of the court provided that the real and substantive dispute between the parties is resolved – see *Chiswa v Maxess Marketing (Pvt) Ltd and 2 Ors* HH 116/20.

In my view the relief sought by the applicant is valid at law as long as the respondent is permitted to extinguish the debt at the interbank rate at the time of payment.

Whether or not applicant is entitled to summary judgment?

In *casu*, the applicant has met all the requirements of an application for summary judgment in that she issued action proceedings against the respondent. The cause of action was founded on a liquid document executed by the respondent. The respondent has entered appearance to defend where

there is no valid *bona fide* defence at all. The acknowledgment of debt is clear what the amount was meant for and how it ought to have been paid.

One wonders why the respondent paid US\$3900.00 if she was not the recipient and why attack the acknowledgement of debt as illegal for sounding in United States dollars. The respondent's defence is clearly not *bona fide* and has been entered solely for dilatory purposes.

As regards duress, I take the view that the respondent seeks to create an artificial dispute of fact by alleging that she was coerced to sign the Acknowledgment of Debt. The onus is on the coerced party to prove duress. In order to establish duress the respondent must satisfy all its requirements.

I find that the defence proffered is flimsy. The allegations of duress are not only frivolous but vague generalities which are not substantiated with any solid facts. The respondent has failed to show any legal aid factual basis for refusing the relief that the applicant seeks.

In the result it is ordered that;

1. The application for summary judgment be and is hereby granted.
2. The respondent pays the applicant the sum of US\$19700.00 (nineteen thousand seven hundred united states dollars) or in ZiG at the interbank rate on the date of payment.
3. The respondent shall pay interest at the rate of 50% per annum from the date of the issue of summons to date of full payment.
4. The respondent shall pay costs of suit on an attorney and client scale.

TAKUVA J:.....

Masiya-Sheshe and Associates, applicants' legal practitioners

Muronda Malinga Masango Legal Practice, respondents' legal practitioners