EVER PROSPEROUS WORLDWIDE LTD
versus
BEKITHEMBA MOYO

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MAFUSIRE J
HARARE

Date of hearing: 19 November 2024
Date of judgment: 3 February 2025

Provisional sentence

L. Uriri, for the plaintiff
T. Zhuwarara, for the defendant

MAFUSIRE J

[1] The plaintiff seeks a provisional sentence against the defendant in the sum of USD4 502 407-11 together with interest thereon at the rate of 18% per annum with effect from 6 May 2024 to the date of full payment.

[2] The plaintiff's claim for provisional sentence is based on a written guarantee or surety by the defendant in favour of the plaintiff in respect of an indebtedness in the sum of USD4 million by the principal debtor, Xtenda Financial Holdings Limited, towards the plaintiff.

[3] In terms of the guarantee, the defendant bound himself to, among other things, pay and satisfy the plaintiff on demand, all the sums of money which the defendant might from time to time owe to the plaintiff, either solely or jointly with others, together with all the legal charges and interest at the agreed rate.

[4] The defendant renounced the benefits of the legal exceptions, including *non causa debiti* [that there is no cause or valid reason for the debt], *errore calculi*, revision of accounts, and no value recorded [the import of which is that there was an error in the

calculation of the debt thereby necessitating a revision of the accounts, there having been no value of the full debt received].

[5] The defendant also renounced the benefits of *de duobus vel pluribus reis debendi* and *ordinis seu excussionis et divisionis* [both of which entitle a guarantor to demand that the creditor must first pursue recovery of its debt and exhaust its remedies against the principal debtor before turning against him. They also permit a guarantor to demand that the magnitude of their liability to the creditor be limited to the extent of their pro rata share of the indebtedness].

[6] In terms of the guarantee, the defendant agreed that any certificate issued by the plaintiff or its agent certifying the amount due under the guarantee would be accepted as conclusive proof of such indebtedness for the purposes of summary judgment or provisional sentence in any competent court for the amount stated in such certificate.

[7] The certificate of indebtedness by the plaintiff indicated an amount in the sum of USD4 502 407-11 as due and owing by the defendant to the plaintiff as at 6 May 2024 in terms of the guarantee.

[8] The plaintiff's summons for provisional sentence was issued allegedly in terms of r 14[2] of the High Court Rules, 2021, SI 202 of 2021. Rule 14[1] of these Rules permits a plaintiff who is the holder of a valid acknowledgement of debt to issue a summons for provisional sentence. Sub-rule [2] directs peremptorily [by the use of the word "*shall*"] that the summons for provisional sentence be in the forms as prescribed. The defendant is permitted to attend court on the date and time set out in the summons to admit or deny the liability.

[9] Sub-rule [7] of r 14 aforesaid also permits the defendant to file a notice of opposition and supporting affidavits prior to the date of hearing of the provisional summons. It also provides for the filing of answering affidavits and any further affidavits.

[10] In the present case, the defendant filed a notice of opposition and an affidavit contesting the plaintiff's entitlement to provisional sentence. He has raised the objections below:

- that a court in Zimbabwe, without an attachment to found or confirm jurisdiction, has no jurisdiction to sit in judgment over the defendant who, to the knowledge of the plaintiff, was at all times a resident of the Republic of South Africa and therefore a *peregrinus* to Zimbabwe;

- that the Commercial Division of the High Court has no jurisdiction over provisional sentence because the procedure is not provided for in its Rules and that the plaintiff has wrongly purported to adopt and adapt those forms for provisional sentence as are prescribed for the General Division by its own Rules of procedure;

- that by not filing an answering affidavit to the defendant's averments in his opposing affidavit contesting the provisional sentence summons, the plaintiff must be deemed to have accepted all of them because according to law, what is not denied in affidavits must be taken to be admitted;

- that the underlying claim against the defendant is unlawful in that the plaintiff's claim is amalgamated into a principal debt and interest which, at 18% per annum, contravenes the Moneylending and Rates of Interest Act that criminalises the recovery of interest that is denominated above the prescribed rate of 5% per annum;

- that the plaintiff's summons for provisional sentence is predicated on the certificate of indebtedness which is not a liquid document as prescribed by the rules; and

- that the same dispute having been taken to arbitration on more than one occasion before, and to more than one arbitrator both of whom issued final awards, it is now *lis finita* and cannot therefore be brought before the courts for adjudication.

[11] In response to the defendant's grounds of objection aforesaid, plaintiff counsel, in his heads of arguments, begins with the chant by BARTLETT J in *Industrial Equity Ltd v Walker* 1996 [1] ZLR 269, at 308B:

> "Things that go round come round. Walker [the defendant] has had a merry dance. But he would, to my mind, be well advised to realise that the music has stopped and the time has come to pay the piper."

[12] Counsel's point is that the defendant essentially admits the debts in that he does not challenge the validity or admissibility of the guarantee upon which the plaintiff's claim is based, or the quantum thereof, but instead, choses to raise frivolous defences the obvious intention being to buy time and postpone the day of reckoning. I proceed to deal with the defendant's objections.

[a] **The court has no jurisdiction over a *peregrinus* defendant**

[13] Manifestly, this defence is raised in bad faith. Quite apart from everything else, the defendant has since submitted to the jurisdiction of the Zimbabwean courts and its tribunals in the several facets of the dispute. From his own papers, the dispute has been to arbitration on more than one occasion with the arbitrators proceeding to issue final awards. The defendant does not say that those arbitrators terminated the proceedings on account of the defendant allegedly being a *peregrinus* and therefore one beyond the reach of the jurisdiction of the local courts. That is not all.

[14] Last month but one I delivered judgment number HH05-2025 in *Ever Prosperous Worldwide Ltd v Xtenda Financial Holdings [Pvt] Ltd & Ors* HCHC 524-24 in which the same plaintiff herein successfully proceeded against the principal debtor and its guarantors, including the same defendant herein, over another facet of the same dispute. The defendant did not contest the jurisdiction of this court over his alleged *peregrinus* status. That is not all.

[15] It is common cause that the defendant is a citizen of Zimbabwe despite his status as a permanent resident in South Africa. Nothing suggests he is a *peregrinus* in Zimbabwe. He tries to hide behind the fact that the guarantee document cites a South African address as his place of domicile, that the document was signed in South Africa and that it says nothing about the local courts in Zimbabwe having the jurisdiction to sit in judgment over him in respect of that guarantee.

[16] However, a person can have more than one place of residence: see *Shah v London Borough of Barnet* [1983] 1 All ER 226, [1983] 2 WLR 16 and [1983] 2 AC 309. Furthermore, in the same guarantee document, the defendant actually chose as his address for service a Zimbabwean address, namely 2 Downie Avenue, Belgravia, Harare, Zimbabwe, which would remain the same even if he changed residency or status. His counsel argues that this was for the purposes of a letter of demand only. But a summons constitutes a demand: *ABSA Bank Ltd v The Cure Group CC & Ors* [2012] ZAGPPHC 284, at para [5] and *Standard Bank of South Africa Ltd v Hand*

2012 [3] SA 319, at para [22]. The defendant is trying to split hairs. This is not a valid defence.

[b] **Provisional sentence procedure is alien to the Commercial Division**

[17] In my paraphrase, provisional sentence, like summary judgment, is a procedure designed to afford speedy relief to a creditor who has an unanswerable claim against a debtor by reason of an acknowledgment of debt by the debtor or some such liquid document, thereby relieving the creditor of the delay, expense and agony of a trial.

[18] In my further paraphrase, the provisional sentence procedure, in virtually all the civil and common law jurisdictions of the world, lies at the heart of mercantile law in the ease of doing business.

[19] In my desktop and other research, specialised courts to handle commercial disputes expeditiously have been set up in most civil and common law jurisdictions of the world, starting with England in 1895. A small sample may help:

England	1895
South Africa [Johannesburg]	1993
Uganda	1996
Tanzania	1999
Ghana	2005
Rwanda	2007
Malawi	2007
India	2015
Zimbabwe	2022

[20] The Commercial Division in Zimbabwe opened its doors to the public on 6 May 2022. It is governed by, among others, its own set of rules [S.I. 123 of 2020, as read with S.I. 179 of 2022]. But it is also governed by the rules of the Civil Division of the High Court, S.I. 202 of 2021. In particular, r 4 of the Commercial Division Rules provides that the Commercial Division Rules shall apply to all commercial disputes brought before the Division but that should any procedural matter arise during any proceedings before the court which may not specifically be regulated or provided for under its own rules, then the rules for the General Division would apply *mutatis mutandis*.

[21] The defendant is scratching the barrel. The broad rationale for establishing specialist divisions of a court is, among other things, to streamline and improve the citizens' right of access to justice. The Commercial Division is guided by certain core-principles or values in the determination of disputes. Those are listed in Para 3 of the Second Schedule to the Rules. They include the reduction and simplification of processes, curtailment and minimization of costs and time, new rules of procedure, ***adaptability***, and so on. These core-attributes resonate perfectly well with the provisional sentence procedure.

[22] At any rate, s 171[3] of the Constitution of Zimbabwe which permits the division of the High Court into specialised divisions, does have the rider that every such division must be able to exercise the general jurisdiction of the High Court in any matter brought before it.

[23] The rest of the defendant's argument under this head, such as that the plaintiff has unprocedurally adulterated the forms for provisional sentence by, for example, inserting in the case citation the caption 'Commercial Division', lack merit. They are manifestly a sterile argument about forms: see *Zimbabwe Open University v Mazombwe* 2009 [1] ZLR 101 [H] and *Marick Trading [Pvt] Ltd v Old Mutual Assurance Co Zimbabwe Ltd & Anor* 2015 [2] ZLR 320 [H]. Despite the colloquial reference to the Commercial Division as a Commercial Court, it is not a court separate from the High Court. It is just a Division. One of its core-attributes include **adaptability**. The defendant's objection under this head has no merit.

[c] **Plaintiff's failure to file an answering affidavit**

[24] An answering affidavit or further affidavits in motion proceedings are not obligatory. Rule 14[7] of the High Court Rules permits the filing of an answering affidavit. But it does not say one *must* be filed every time a notice of opposition is filed. It is up to the applicant in every case to assess the necessity of filing an answering affidavit.

[25] A provisional sentence summons is founded on a liquid document. All that the plaintiff does, really, is to place the liquid document before the court. The document must speak for itself. Provisional sentence is a summary procedure. It is not the full procedure. The privilege accorded a defendant to oppose the grant of the provisional sentence, either orally on the day of the hearing, or via an affidavit in advance of the hearing, does not in any way transform the procedure into full-fledged contested motion proceedings. They remain summary proceedings the standard for proof for which remains on a *prima facie* basis. The defendant will have their full bite of the cherry at the trial. The matter can still go all the way to trial despite the grant of a provisional sentence.

[26] In the present case, the plaintiff avers that by not filing an answering affidavit it was signalling a joinder of issues. I observe that the bulk of the issues raised in the notice of opposition pertain to matters of substantive and procedural law. The few facts alleged relate to how the debt is possibly overstated. There is little or no challenge to the liquid document itself, namely the guarantee. A liquid document is the backbone of provisional sentence. The challenge to the certificate of balance is misplaced. I deal with it below.

[27] Therefore, I hold that the failure by the plaintiff to file an answering affidavit is neither here nor there. It cannot be deemed to be an acceptance of the objections in the notice of opposition. The objection under this head is dismissed.

[d] **The underlying claim is unlawful**

[28] The objection herein is in relation to the plaintiff's entitlement, if any, to charge interest at above the prescribed rate of 5% per annum, allegedly in terms of the Moneylending and Rates of Interest Act [*Chapter 14:14*] ["***the Act***"].

[29] With respect, the defendant's objection herein seems half-hearted. It is little developed. The defendant seems to be relying on the general prohibition against excessive rates of interest in s 8 of the Act aforesaid which applies to lenders as defined. The defendant is manifestly inviting the court to make certain assumptions and from there proceed to make a ruling. That cannot be proper. Section 8 of the Act is plainly subject to the other

provisions of the same Act, for example s 14, s 15 and s 20. The defendant does not explain how the plaintiff comes only within the ambit of s 8 and not the others.

[30] I consider that the general prohibition in s 8 of the Act against the charging of interest by a lender above the prescribed rate is not absolute. Section 14 recognises a situation where a lender can charge interest on a loan at a rate of interest higher than the prescribed rate for as long as the conditions stipulated therein are met.

[31] The conditions stipulated in s 14 aforesaid, in my paraphrase, is that a loan of money not backed by any document registered in the Deeds Registry, which was the case here, has to be backed by an instrument of debt signed by the debtor at the time of the lending, setting out all the essential parts of the transaction and a copy of which has to be given to the debtor. That apparently was the situation in this matter.

[32] Section 15 of the Act also recognises lending at a rate of interest above the prescribed rate provided that on demand by the borrower and payment by them of the prescribed amount, the lender supplies them with a breakdown of the amount actually disbursed, the rate of interest charged, the interest accrued and the interest unpaid, the amounts paid off by the borrower and details about the lender's manner of appropriation of the borrower's payments.

[33] Finally, in terms of s 20[5] of the Act, the provisions of the Act, thus including s 8 aforesaid, do not apply to a loan of money by a moneylender outside Zimbabwe from monies outside Zimbabwe even though the borrower may be in Zimbabwe, whether or not the instrument of debt in respect of such loan is executed in Zimbabwe, and whether or not such sum of money is transferred to Zimbabwe.

[34] The point about s 14, s 15 and 20[5] of the Act is that, among other things, the defendant has the onus to prove such a plausible defence as would defeat a provisional sentence summons by, among other things, showing that none of the exclusions in these provisions applies to the loan of money in question. He has said nothing.

[35] The defendant does not question the validity of the guarantee. Having renounced the benefit of the legal exceptions as aforesaid, he is prohibited from raising most of the

objections he has raised. At this stage of provisional sentence, the concern of the court is the liquid document. Everything else may be tested at the trial.

[e] **The certificate of balance is not a liquid document**

[36] This objection, like the rest of them, is not sincere. It is meant to buy time. The plaintiff's provisional sentence summons is not founded on the certificate of balance. It is founded on the liquid document, the guarantee. Its wording is unequivocal. At the beginning of this judgment, I paraphrased the intrinsic provisions.

[37] The certificate of balance is an adjunct to the liquid document. Its purpose is to prove the balance due by the defendant for the purpose of provisional sentence. It is a contractual provision. It is not the function of the court to make or amend a contract for the parties. Its function is merely to enforce the parties' agreement where it does not violate the law of the land.

[38] The defendant's bad faith in these proceedings manifests in another way. He does not deny the indebtedness *per se*. The certificate of indebtedness makes reference to some confirmation of the quantum by the defendant's own financial advisors, or those of the principal debtor. His objection in this particular regard is not that the auditors' report is non-existent or a fabrication. It is that the plaintiff has not attached it. The plaintiff did not need to attach it. Only the certificate of indebtedness was necessary. That is what the parties agreed upon. It is curious that the defendant does not attach the so-called auditors' document himself.

[f] **Plaintiff's claim is now *lis finita* by reason of the arbitration**

[39] Not only was this objection absurd right from the onset given that the issues at arbitration were vastly different from those before the court, but also, those arbitration awards were subsequently set aside. The full detail on this aspect is in the aforesaid judgment under the reference number HH05-2025.

[g] **Disposition**

[40] All the defendant's objections, both in the notice of opposition and heads of argument, lack merit. None of them goes to attack the validity of the liquid document upon which the plaintiff's claim is premised. He may raise them at trial, not at the provisional summons stage.

[41] The plaintiff is entitled to its provisional sentence in the amount claimed together with interest, costs at the higher scale and collection commission in a fixed amount. This was all by agreement. Therefore the following order is hereby issued:

i/ The defendant shall pay the plaintiff the sum of US$4 502 407-11 together with interest thereon at the rate of 18% per annum from 6 May 2024 to the date of payment in full.

ii/ The defendant shall pay the costs of suit on a legal practitioner and client scale and collection in the sum USD450 240-71.

3 February 2025

Atherstone & Cook, applicant's legal practitioners
Gill, Godlonton & Gerrans, legal practitioners for respondents 1 to 4