

NGONIDZASHE MUWONWA
and
SHOPERAI MUWONWA
versus
MAI-KAI REAL ESTATE
and
BERNARD MUTANGA MAHARA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 19 June 2013 and 27 June 2013

Opposed Matter

I Mugwagwa, for the plaintiffs
Ms S Takawira, for the defendants

TAKUVA J: On 10 May 2013, the plaintiffs issued summons against the defendants claiming provisional sentence in the sum of USD23000-00 together with interest thereon at the rate of 10% per annum reckoned from 26 April 2013 to date of payment in full, plus costs of suit on legal practitioners/client scale.

The plaintiff's claim is based on both an agreement of sale of certain stand number 3252 Chadcombe Township o Lot 3 of Makabusi dated 28 December 2012 and a subsequent letter of acknowledgment of debt executed by the defendants dated 16 April 2013. In terms of the aforesaid documents an amount of USD 23 000-00, together with interest at the rate of 10% per annum is payable to the plaintiffs.

It was further alleged in the summons that the amount claimed by the plaintiffs has become due and payable to them because the defendants have failed to deliver the said stand 3252 Chadcombe Township as per the agreement of sale, and further, defendants have failed to refund the purchase price. When the provisional sentence summons was served, defendants did not satisfy the claim. Instead, they filed a notice of opposition supported by an opposing affidavit wherein they raised the following points;

- (a) That there is no nexus or explanation as to why second defendant is being sued in his personal capacity.

- (b) There is no basis for claiming interest at the rate of 10% when the agreement or the letter does not contain such a clause.
- (c) The cause of action is muddled in confusion and fraught with legal irregularities.
- (d) The letter that plaintiffs rely on is not a liquid document in that it was based on a *justus error* in that it is based on para 5 of the agreement yet that paragraph does not entitle the plaintiffs to full refund of the purchase price without the deductions of 5% from that purchase price.
- (e) There was no deduction of lawyers fees in respect of the work already commenced by Conveyancers in terms of para 3 (c) (i) (ii) of the agreement of sale.
- (f) Deductions for costs of drawing the agreements in terms of para 17 of the agreement of sale are not encompassed in the letter.

The letter that the plaintiffs rely on reads:

“REF: CANCELLATION OF AGREEMENT OF SALE – STAND 3252
CHADCOMBE TOWNSHIP OF LOT 3 OF MAKABUSI.”

With reference to above and your letter of 3 April 2013, in which letter you were giving us notice of cancellation of the agreement of sale entered between us on 28 December 2012.

We are hereby accepting and confirming the cancellation of the said agreement of sale at your request.

According to our records, you have paid the full purchase price of US\$23 000-00 (twenty three thousand dollars) towards the purchase of the property. We shall be making your refund of the amount you paid in terms of clause 5 of the said agreement. The refund will be transferred to the account as instructed in your letter within seven (7) working days from the date of this letter which will be on Friday 26 April 2013.

By this agreement we are instructing our legal practitioners not to attend to the transfer of the property to you and that we are now putting the property back on the market for resale----.” (my emphasis)

This letter was addressed to both plaintiffs and signed by the second defendant.

As regards the agreement of sale, clause 5 reads as follows:

“PROFESSIONAL FEES

The purchaser hereby authorises the seller to charge 5% of the purchase price for ESTATE AGENT commission such amount shall be paid on the signing of this agreement. In the event this agreement is cancelled such amount shall be non-refundable.” (my emphasis)

Clause 7 reads “Interest

In the event of the purchaser not making a payment on the said date stipulated in clause 6 interest on the balance of the purchase price shall be calculated monthly in advance at the prime interest rate of 10% from due date until the date of such payment.”

Clause 8 relates to the purchaser’s liability for the payment of all rates and taxes levied on the stand. Clause 17 relates to costs and it reads:

“The costs of drawing and preparing this agreement shall be borne by the purchaser.”

The issue in this matter is whether or not the letter and the agreement of sale amount to liquid document for the purposes of the provisional sentence procedure as contained in 04 rule 20 of the High Court Rules, 1971. The order provides that where the plaintiff is the holder of a valid acknowledgment in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document. What amounts to a liquid document is not defined in the rules. However, the courts have held that any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document – See *Sibanda v Mushapaidze* 2010 (1) ZLR 216 where MAKARAU JP (as she then was) held that “Thus, any letter, to the extent that it is clear, unequivocal and unambiguous and contains an acknowledgment of debt, can constitute a liquid document for the purposes of the Rules on provisional sentence. Where the letter is ambiguous, or where an offer to make payment is conditional, the letter would not constitute a “liquid document.”

See also *Allied Holdings Ltd v Myerson* 1948 92) SA961 W and *Oostelike Transvaal Ko-Operasie BDK v Kruger* 1958 (2) SA 329 (T)

In *casu*, it can not be said that the letter is clear and unambiguous as against the amount to be paid to plaintiffs. This is so because it does not indicate all the deductions in terms of the agreement of sale. It refers only to clause five, but there are other clauses which require the

purchaser to make certain payments. See for example clauses eight (8) and seventeen (17). For these reasons, I find that the letter is ambiguous and unclear.

While clause seven (7) of the agreement of sale requires the purchaser in the event of default to pay interest at the rate of 10% from the due date to the date of such payments, it does not state that in the event that the agreement is cancelled the seller must refund the plaintiffs the purchase price plus 10% interest from the due date to the date of payment. In this respect, I find that if the letter is read together with the agreement there is ambiguity. The letter, for example does not state how costs referred to in clause 17 of the agreement of sale would be dealt with or how they were dealt with if at all the payments had been done by the time of cancellation.

On the basis of the foregoing, I will hold that both the letter and the agreement of sale are not liquid documents for the purposes of the Rules on provisional sentence. Accordingly, I make the following order:

1. Provisional sentence is refused
2. The matter is hereby ordered to stand over for trial.
3. The defendants shall enter appearance to defend within ten (10) days of the date of this order.
4. Costs of this hearing shall be costs in the cause.

Zimbodza and Associates, plaintiffs' legal practitioners
Govere Law Chambers, defendants' legal practitioners