

INTERFIN BANKING CORPORATION LIMITED (*under curatorship*)
versus
VEANARCY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 24 July 2013 & 1 November 2013

Provisional sentence

L. Uriri, for plaintiff
H. Mutasa, for defendant

MAFUSIRE J: The plaintiff claimed provisional sentence in terms of Order 4 of the Rules of this court. Rule 20 of that Order reads as follows:

“20. Summons claiming provisional sentence

Where the plaintiff is the holder of a valid acknowledgement 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.”

A liquid document is one which evidences by its own terms, without the need for extrinsic evidence, an unconditional acknowledgement of indebtedness in an ascertained sum of money the payment of which is due; see *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (CPD) at p 994F – H. See also the yet to be reported judgment of TLALETSI J in the two cases of *Momentum Group Ltd v Le Grange AJ* and *Momentum Group Ltd v Saunderson CP* 2012 SA Northern Cape High Court, www.saflii.org/za/cases/ZANCHC/2012/52.

In the present case the plaintiff’s claim was for US\$142 672-01 arising out of monies loaned and advanced to the first defendant in terms of a loan or facility agreement. The initial upper limit of the facility was US\$50 000-00. It was subsequently increased to US\$143 900-00. As security for the loan the first defendant had passed a mortgage bond in favour of the plaintiff for US\$65 000-00, and two deeds of hypothecation for US\$ 55 000-00 and US\$95 850-00. Thus the total owing on those bonds was US\$215 850-00. The bonds were over a property owned by the first defendant. The second and third defendants, being

directors of the first defendant, had bound themselves in writing as sureties and co-principal debtors with the first defendant over its liabilities to the plaintiff.

In order to escape provisional sentence on a liquid document the defendant must satisfy the court on a balance of probabilities that it is unlikely that the plaintiff will succeed in the principal case; *Allied Holdings Ltd v Myerson* 1948 (2) SA 961 (W) at p 968. See also *De Atouquia v Braz* 1989 (2) SA 807 (AD).

In this matter the defendants opposed the claim on two grounds. The first was that they were being sued for the same debt on the basis of the same documents but by another entity, Al Shams Global BVI Limited, to which the plaintiff had ceded its claim. It was said that this other action was pending.

The second ground of opposition was that the first defendant had filed a claim of its own against the plaintiff for damages for breach of a lease agreement in an amount far in excess of the plaintiff's claim such that after netting off the plaintiff would remain indebted to the first defendant. The defendants averred that the first defendant's claim for damages had stalled because the plaintiff had been placed under curatorship with the effect that proceedings against it had been suspended.

The loan agreement or facility letter set out in some detail the terms of the loan. Among other things, it set out the amount available under the agreement, the draw down procedure, the repayment time table and some default penalties, to mention just but a few. There was an acceptance of the terms of the facility which was signed for by the two authorised signatories for the first defendant. Furthermore, attached to that facility agreement was an extract of the minutes of the board of directors for the first defendant in which the terms and conditions of the credit facility had been accepted. The second and third defendants had been given the authority to sign all such documents and to do all such things necessary to give effect to the resolution.

The defendants acknowledged all the plaintiff's documents. Rule 21 states that a summons for provisional sentence shall *inter alia* call upon the defendant to satisfy the plaintiff's claim, or in default:

“... to appear before the court ... to show cause why he has not done so, and to acknowledge or deny the signature to the said liquid documents or the validity of the claim.”

When plaintiff's claim for provisional sentence came up on the unopposed roll in motion court I granted it despite the defendants' opposition. However, I directed that the

plaintiff would have to pay security in accordance with the provisions of Order 4. The defendants have since asked for the reasons for my decision.

Since the defendants admitted the plaintiff's documents upon which its claim for provisional sentence was based, their opposition and appearance in court was undoubtedly to show cause why they had not paid and/or to deny the validity of the claim.

In an answering affidavit the plaintiff had averred that the claim against the defendants by Al Shams Global BVI Limited, the entity to which the plaintiff had ceded its claim, had been withdrawn. This appeared to be common cause. Therefore this ground of opposition had fallen away.

As for the second ground, I was not persuaded that the defendants had shown any plausible cause such as to deny the plaintiff the relief which it sought. I was also not satisfied that their resistance to paying the amount claimed had any merit.

The first defendant's claim for arrear rentals against the plaintiff was based on the fact that the plaintiff had taken up tenancy at the first defendant's premises. In its summons the claim for arrear rentals was \$4 000-00. The plaintiff had subsequently reduced its claim for provisional sentence by \$20 000-00 which it tendered for the rentals. It then proceeded to claim provisional sentence on the balance of \$122 672-01. Thus, that part of the defendants' second ground of opposition had also fallen away.

The second part of the first defendant's claim against the plaintiff was for holding over damages at the rate of \$2 000-00 per month from November 2011 to the alleged duration of the lease period, allegedly 31 December 2030 – a period of 19 years. Plaintiff was contesting the claim. I questioned the soundness and legal validity of the first defendant's claim. It was common cause that the plaintiff had been placed under curatorship. Thus the legal relationship between the parties had altered materially. At any rate, it could not be the position that the first defendant would simply sit back, bid its time and 19 years later present the plaintiff with a bill for arrear rent calculated at \$2 000-00 per month. A party that claims damages for future or anticipated loss is required to mitigate its loss. I was not prepared to let an uncertain and illiquid claim stand in the way of what was classically a liquid claim which was supported by what were classically liquid documents and which the defendants had expressly admitted.

The provisional sentence procedure is designed to afford summary relief to a plaintiff whose claim is clear and based on a written acknowledgement of debt called a liquid

document. MAKARAU JP, as she then was, in *Beki Sibanda v Elisha K Mushapaidze* HH 56-2010, at p 5 of the cyclostyled judgment, stated:

“Provisional sentence procedure is a summary procedure that allows the holder of a liquid document to obtain judgment and execute upon that judgment before the trial of the matter. In that regard, it may be termed an extraordinary remedy procedure although it has been part of our civil process for decades.”

TLALETSI J in the two *Momentum Group Ltd* cases above, in paragraphs 12 and 13 on page 7 of the cyclostyled judgment, put it as follows:

“[12] It is trite that provisional sentence procedure provides a process whereby a creditor who has sufficient documentary proof with a speedy remedy for the recovery of money due without having to go through an expensive, cumbersome and often dilatory machinery of an illiquid action. A creditor who has a liquid document is able to obtain an enforceable provisional judgment speedily without having to wait for the final determination of the dispute between the parties.”

[13] A judgment granted in terms of this procedure is founded upon the presumption of indebtedness evidenced by the document which is truly liquid without requiring assistance of extrinsic evidence” (my emphasis).

Unlike the summary judgment procedure, also an extraordinary remedy the judgment of which is final unless appealed against, a provisional sentence, even though executable before trial, remains provisional. The defendant against whom a provisional sentence is granted can still have his day in court, if he so wishes. The rules are quite elaborate on that. Rule 28 reads:

“28. Rights of defendant when provisional sentence granted

A defendant against whom provisional sentence has been granted may –

- (a) within one month after the attachment made under a writ of execution issued by virtue of such sentence; or
- (b) if he has satisfied the judgment without an attachment, then within one month after having done so;

cause an appearance to be entered with the registrar to defend the action, and shall notify the plaintiff of such entry. If he fails to do so within the stipulated time, the

provisional sentence shall immediately thereafter become a final judgment of the court and the security given by the plaintiff shall *ipso facto* become null and void.”

The provisional sentence may also become a final judgment in terms of r 29 where the defendant appears in court and acknowledges the claim, or files with the registrar in advance an acknowledgement of the claim over his signature which is witnessed by his attorney or verified by affidavit.

Rule 33 concludes the matter of the defendant’s right to go to trial despite the granting of the provisional sentence as follows:

“33. Where provisional sentence granted and defendant enters appearance to defend action

Where a defendant against whom a provisional sentence has been granted enters appearance to defend the action, the summons shall stand as the plaintiff’s declaration, and the defendant shall file his plea within ten days after the entry of appearance, and thereafter the matter shall proceed as an ordinary action.”

In my view the efficacy of the provisional sentence procedure would be compromised if the summary nature of the proceedings were to be transformed into a fully-fledged opposed motion matter by canvassing in much detail the merits of the claim and the merits of the defence. It is not suggested that in every situation that a plaintiff produces a liquid document and claims provisional sentence on it the court cannot go behind that document. In appropriate situations it can. And the *onus* remains on the plaintiff. The law in this regard has been set out in a number of authorities. In *Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd and Another* 1963 (1) SA 36 (SR), YOUNG J, at p 40, recited a passage from the judgment of SOLOMON J in *Union Share Agency & Investment Ltd v Spain* 1928 AD 74 as follows:

“I think we may extract the principle that where an acknowledgement of indebtedness is sufficiently clear and certain and payment depends on some simple condition or event, it is sufficient for the plaintiff to allege that the condition has been complied with or that the event has happened, and that then the *onus* lies on the defendant to show what was intended by the document to be a condition precedent to entitle the plaintiff to succeed has not been complied with” (my emphasis).

YOUNG J, on the same page, went on to elaborate as follows:

“The question then is whether a sufficiently clear case has been made out by the plaintiff to justify provisional sentence. In deciding this issue ‘piecemeal processes of reasoning’ (see *Arthur v Bezuidenhout & Miemy*, 1962 (2) SA 566 (AD) at p. 574) would, I surmise, be out of place. The question in the end is whether on the whole of the evidence the case is sufficiently clear. But, of course, in the task of discharging the *onus* the plaintiff might derive assistance from various factors. **Thus, if the defendant does not deny his signature or the cause of action alleged in the summons that prima facie entitles the plaintiff to provisional sentence.**” (emphasis added).

In the present case the defendants acknowledged both the plaintiff’s liquid documents and the plaintiff’s cause of action. What was in issue really was the quantum because the defendants felt that a netting off of what they owed the plaintiff against what they alleged the plaintiff owed them would result in the plaintiff being indebted to them. But as I have observed already, defendants’ claim was tenuous. It was based on nebulous grounds. I was not satisfied that on a balance of probabilities they would succeed. I did not even have to go behind the liquid documents because that was not their case. Their case was completely divorced from that of the plaintiff and its liquid documents. It was for that reason that I granted provisional sentence as prayed for, albeit on condition that the plaintiff paid security in accordance with r 31.

Dube, Manikai & Hwacha, legal practitioners for the plaintiff

Gill, Godlonton & Gerrans, legal practitioners for the defendants