

BERVIC (PRIVATE) LIMITED  
versus  
GIFT SANGO-MOYO

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 14 July 2016 & 15 August 2016

### **Opposed application-provisional sentence**

Ms A. *Manuel*, for the plaintiff  
V *Madzima*, for the defendant

MUREMBA J: On 14 July 2016 I heard this matter and delivered an *ex tempore* judgment. I have now been asked for the written reasons and these are they.

The plaintiff's claim is for provisional sentence in the amount of US\$21 722.05 together with interest thereon at the agreed rate of 22% per annum from 4 December 2015 to date of full payment and costs of suit.

The plaintiff's claim is based on an acknowledgement of debt executed by the defendant on 4 December 2015.

In response the defendant raised the following points in *limine*.

- 1) The summons for provisional sentence is fatally defective in that it cites the wrong defendant.

The defendant stated that the acknowledgement of debt unequivocally identifies Big Mugg Café as the debtor. Big Mugg Café is a separate legal entity from Gift Sango-Moyo who is cited as the defendant in the present proceedings. He said that he did not assume the debt of Big Mugg Café or become a surety and co-principal debtor. The defendant stated that he only signed the acknowledgement of debt as a representative of Big Mugg Café.

In response the plaintiff stated that the defendant signed the acknowledgement of debt in his personal capacity and assumed the debt of Big Mugg Café as his own and as such he was liable for the debt.

The acknowledgement of debt reads,

“4<sup>th</sup> December 2015

Acknowledgement of Debt \$21, 722.05

This letter serves to confirm that Big Mug Café represented and owned by Gift Sango-Moyo of Bervic Building Eastlea Shopping Centre owes the amount of \$21. 722.05 (twenty one thousand and seven hundred and twenty two dollars and five cents), including interest at an agreed rate of 22% per annum in outstanding rents to Bervic (Pvt) Ltd.

I Gift Sango-Moyo accept the debt and agree to pay all outstanding amounts within the next seven days from today’s date. (My underlining)

Signed

Gift Sango-Moyo  
Owner Big Mugg Café  
Date.....

George Stewart  
Co –owner Bervic (Pvt) Ltd  
Date 4/12/15”

I am in agreement with the submission made by the plaintiff that the first paragraph is confirmation that Big Mugg Café which is owned by the defendant owes the plaintiff the sum of \$21.722.05. The second paragraph shows that the defendant assumed the debt as his own because he said, “I Gift Sango-Moyo accept the debt and agree to pay all outstanding amounts.” If it was Big Mugg Café which was supposed to pay the debt as the defendant says then he should simply have said Big Mugg Café accepts the debt and agrees to pay it. He should not have said, “I Gift Sango-Moyo accept the debt.” Alternatively he should have categorically stated that he was accepting the debt and signing the document for and on behalf of Big Mugg Café but he did not do so. As correctly stated by the plaintiff there is no indication on the face of the document that the defendant was signing the acknowledgement of debt on behalf of the company.

I therefore make a finding that the plaintiff sued the correct defendant. The point *in limine* is dismissed.

- 2) The acknowledgement of debt does not meet the criteria of a valid acknowledgement of debt as it does not state when or at what point the debt became due and payable.

The defendant said that after he inserted his signature he did not insert the date when he signed the acknowledgement of debt. He said that as such the document does not state at what point the debt became due and payable.

As was correctly submitted by the plaintiff the acknowledgement of debt clearly stated that payment would be made “within the next seven days from today’s date.” Although the defendant did not insert the date on the portion reserved for the date below his signature it is clear that this acknowledgement of debt was signed on 4 December 2015. This date is

inserted right at the top of the document. So the fact that the defendant did not insert the date below his signature as was done by the plaintiff's representative is neither here nor there. It is therefore clear that the debt became due and payable within 7 days from the 4<sup>th</sup> of December 2015. Even if the date when the acknowledgement of debt was signed had not been inserted at all, still 7 days lapsed long back from whatever date the document was signed. By the time the defendant filed his notice of opposition and opposing affidavit 7 days had long lapsed. Therefore this point *in limine* has no merit at all, it is also dismissed.

The defendant raised a third point in *limine* on this court's lack of jurisdiction but at the hearing of this matter he abandoned it. I noted that he had not addressed that point in his heads of argument. I will therefore not deal with it.

On the merits the defendant stated that he disputes the amount claimed and stated that he has never owed the plaintiff the amount claimed or any amount whatsoever. The defendant does not dispute that he signed the acknowledgement of debt stating that Big Mugg Café owed the plaintiff the sum of \$21,722.05. He therefore confirmed that Big Mugg Café was indebted to the plaintiff in that amount. Personally before he signed the acknowledgement of debt he did not owe the plaintiff any money. However, when he went ahead and signed the acknowledgement of debt stating that he was accepting the debt and was going to pay it himself he made himself liable for the debt of Big Mugg Café. He therefore became indebted to the plaintiff in the amount that Big Mugg Café owed the plaintiff.

In the result I granted the claim for provisional sentence. I ordered as follows.

1. The claim for provisional sentence be and is hereby granted.
2. The defendant shall pay the plaintiff the sum of US\$21 722.05, together with interest thereon at the agreed rate of 22% per annum from 4<sup>th</sup> December 2015 to date of full and final payment.
3. The defendant shall pay costs of suit.

*Atherstone & Cook*, applicant's legal practitioners  
*G.N. Mlotshwa & Company*, respondent's legal practitioners