TRIANGLE LIMITED ZIMBABWE
versus
ADMORE HWARARE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 24 October 2016 & 9 November 2016

**Opposed Matter**

*T Mpofu*, for the applicant
*L Uriri*, for the respondent

DUBE J: The applicant brings an application for summary judgment in terms of Order 10 r 64(1) of the High Court Rules, 1971. The applicant is Triangle Ltd, Zimbabwe which also trades as Tongaat Hullet Zimbabwe, Mkwasine Estates and Hippo Valley Estates. It is involved in various commercial and industrial enterprises in the sugarcane business.

The basis of the applicant's claim is as follows. The applicant is in the business of sugarcane farming. The applicant entered into an agreement with the respondent to provide sugar cane farming services. On 7 October 2015 the applicant instituted summons against the respondent claiming $ 170 292, 26 and respondent entered appearance to defend followed by a plea wherein he disputes the value of the services he received from applicant. The respondent signed a memorandum of acknowledgment of debt and also deposed to an affidavit acknowledging being indebted to the applicant in the sum of $170 292 .26. The respondent does not in his plea explain the acknowledgment of debt, [hereinafter referred to as the AOD]. The applicant asserts that the respondent acknowledged the debt and has no *bona fide* defence to the balance of money claimed and is out to frustrate the applicant and delay the inevitable by defending these proceedings.

The respondent defends the application. The respondent accepts that he accessed inputs under the Susco project run by the applicant. He denies that the contract entered into was solely between the applicant and himself. He asserts that Banc ABC was the other party. He does not owe the applicant but the bank. The arrangement was that the applicant would supply him with inputs and services after which the applicant would submit invoices for the inputs and services rendered to him to the bank for payment. The bank would then pay the

applicant the amounts reflected on the invoices. He owes the bank $169 243.91 and the applicant is claiming $170 292.20 arising out of the same transaction. He vehemently denies that he is indebted to the applicant. The respondent submitted that it relies on the defence of *non causa debit* and hence summary judgment cannot be granted without the debt being clarified and proven in a trial. The respondent asserts that it signed the AOD by mistake.He challenges the AOD and refused to sign a deed of settlement proposed for the settlement of this dispute.

A motion for Summary judgment is brought where a party seeks judgment in its favour summarily without the need for a full trial. The procedure is utilised where there is no real dispute on the facts and when the defendant has no defence to the claim. Summary judgment is as a rule always premised on a liquid document. The applicant's case must be unassailable and there should be no triable issues. Summary Judgment may be granted with respect to the entire claim or on selected issues. The value of the procedure is that it saves time and expenses. An applicant seeking to rely on the summary procedure is required to show that the respondent has no *bona fide* defence to the claim and has entered appearance to defend in order to delay proceedings. The principles upon which an application for summary judgment may be granted where set out in the following authorities,

*Dube* v *Medical Investments International Ltd* 1989 (2) ZLR 280 (SC),

*Scotfin Ltd* v *Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR (H),

*Mubaiwa* v *Eastern Highlands Motel Pvt Ltd* S139/96,

*Maharaj* v *Barclays National Bank Limited* 19761 SA 418(A)

In order to ward off a summary judgment order a defendant is required to establish a "good *prima facie* defence to the action'' in terms of r 66(1)(b) of the Rules of Court 1971. In *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 238 D the court relied on the definition of the phrase given in the case of *Rex* v *Rhodian Investments Trust (Pvt) Ltd 1957 R & N 723; 1957 (4) SA 631 (SR)* in defining the nature of the defence that a defendant is required to put up. In that case the court interpreted the phrase to mean,

> "…….that the defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence at the trial."

A defendant in a summary judgment application must advance an arguable case. He must present evidence in support of his case which if the court believes, could result in the court finding in his favour at the trial. The applicant's claim is based on an AOD. An AOD is a written unequivocal acknowledgment of a debt by a debtor. In it, the debtor acknowledges

that he owes a specified amount of money and undertakes to pay the amount owed. It serves as security to the creditor of the debt owed. It is a liquid document upon which an application for summary judgment can successfully be premised. It allows a creditor to obtain speedy judgment without the need to go through the motions of a trial. Courts are able to give judgment in favour of a creditor who relies on an AOD. An AOD raises the presumption that the signatory is indebted to the creditor in the amounts acknowledged.

Two issues arise from these facts. The first is to do with the existence of a valid *causa debiti.* The second concerns the respondent's defence of a mistaken belief. *Non causa debiti*, is a Latin term which translates to mean that there is no reason or cause for the debt .In a case where the benefit is renounced, a debtor who raises the defence of *non debiti causa* has the onus of proving the absence of a cause of debt. The issue is whether there was a valid *causa debiti* underlying the AOD. In order for an AOD to be enforceable, there has to be a valid *causa debiti* underlying the AOD. In *Peter Brett Featonby –Smith and Waberski* case no 3624/2011 and 3623/11 STEYN J said the following on the requirement for a valid *causa debiti.*

> "There needs to be a real and demonstrable debt owed by the debtor to the creditor. The mere fact that an Acknowledgment of Debt exists does not mean that the document would grant enforceable rights without an existing debt between the parties. If there is no underlying cause then the claim would be unenforceable"

Where the validity of an AOD is put in issue on the basis that there is no cause for the debt, it must be evident that there exists a debt owed by the debtor. This is so because an AOD cannot avail a creditor if it exists *in vacuo*. In the absence of a debt between the parties, an AOD cannot be enforced. The duty to show that there is no underlying cause for the debt is on the debtor.

The respondent avers that when he signed the AOD he did so in error as he was under the mistaken belief that he owed the applicant. It later turned out that he owes the bank instead. In cases where a defence of mistaken belief is raised, the approach of the courts is to consider if the mistake is *iustus.* In *First Rand Bank* v *Consolidated Timber Exports Close Corporation and 5 Others* case no 743/2015 a Kwazulu Natal High Court decision, the court held that in order for a respondent to succeed on a defence of mistaken belief, such a mistake must be *iustus.* The court relied on the case of *George* v *Fairmed (Pvt) Ltd* 1958 (2) SA 465A for the test to determine whether a mistake is *iustus.* The following question was posed,

> "Has the first party –the one who is trying to resile –been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding

> himself … If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

See also *Absa Bank ltd* v *McCrate* ZA ECG HC 5111/14,

Our own Supreme court in *Agribank* v *Machingaifa & Anor* 2008 (1) ZLR 244 (S) at p 254 D-F said the following of mistake,

> "….. a party to a contract relying on an error of judgment, who can go further and show that at the time of the contract he was labouring under some misapprehension, may escape liability under the contract. The onus however is not easy to discharge. Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge,. However material the mistake, the mistaken party will not be able to escape from the contract if the mistake was due to his own fault. This principle will apply whether or not his fault lies in not carrying out the reasonably necessary investigation before committing himself to the contract and in fact in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is *iustus*."

Whether the indebtedness claimed by the applicant arises from these documents produced or from a separate transaction altogether is the issue. To fortify claims that the debt is between it and the bank, the respondent attached to his notice of opposition loan agreements signed between him and Bank ABC. The first agreement reveals that the respondent borrowed amounts not exceeding $41, 583.30 as working capital. The funds would be disbursed through Tongaat Hullet. The respondent would grow sugar cane, deliver and sell it to the company. The second agreement is a loan facility for sugarcane farming amounting to $147 344.00.The respondent's papers show that he owes the bank $169,243.91.

The applicant's claim is based on an AOD debt executed by the respondent in the applicant's favour. The cause for the debt is given as the sum of $170 000.00.. The respondent acknowledges that he signed the AOD .The respondent admitted in the AOD that he owed the applicant. He accepts that he was not forced to sign it. Although in his notice of opposition he states that there was an oral misrepresentation to the effect that the money was due to the bank , no further details are given. The respondent does not deny that he signed the AOD but simply contends that there is no cause for the debt.

The applicant submitted that the AOD was made to settle a disputed reconciliation of the respondent's account that had culminated in court proceedings and is therefore a compromise. A compromise is a settlement by agreement of disputed obligations or of a lawsuit, with each party agreeing to regulate its intention in a particular way , each receding

from his previous position and conceding something. See *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 498.

The preamble to the AOD reveals a compromise and reads as follows,

> "AND WHEREAS hitherto the debtor disputed the quantum of its indebtedness to the Creditor culminating in the institution of the court proceedings at Chiredzi Magistrates Court under cases number GL 455\14 and GL 369/15 wherein the debtor requested a reconciliation of his loan account
>
> AND WHEREAS the reconciliation has now been done and the parties are desirous to revert back to the status quo prior to the institution of both court cases."

The applicant reduced the respondent's indebtedness by factoring in a refund of $$6716.19. The respondent agreed to revert back to the *status quo* prior to the institution of the cases. The AOD was made to settle a disputed reconciliation of respondent's account that had culminated in court proceedings. There was clearly a dispute arising from proceedings between the parties instituted at Chiredzi Magistrates Court which was settled after reconciliation and hence there was a compromise . The respondent failed to explain the preamble to the AOD which makes reference to a reconciliation that resulted in this AOD. The respondent makes it clear in annexure" N", a letter to applicant, that both the respondent and the bank were alive to the existence of prior borrowings by him from applicant. The respondent has failed to show the existence of a tripartite agreement involving the bank. What is clear is that the applicant also owes the bank.. The *causa debiti* is $170 292.26 and is based on the AOD.

The respondent claims that he signed the acknowledgment when he was under the mistaken belief that he owed the applicant the debt acknowledged. He suggests that the minds of the parties were not *ad idem* regarding the subject of the acknowledgment of debt. It is the respondent who is trying to resile from the acknowledgment. He shoulders the blame in that it is his conduct in signing the acknowledgment that led the applicant to believe that he was binding himself. There is no evidence that the mistake was due to a misrepresentation, whether innocent or fraudulent, by the applicant. The debt was verified through a reconciliation that was carried out before the AOD was signed. By signing the AOD he confirmed that he owed and committed himself to pay the debt. In addition to the AOD he swore to an affidavit that he unconditionally was indebted to the applicant. The affidavit was sworn to before an independent person, a commissioner of oaths thereby reinforcing his indebtedness. An affidavit is different from other ordinary statements , it carries more weight than ordinary statements. That he refused to sign the deed of settlement simply means he had

changed his heart. The inescapable conclusion is that the respondent is to blame and the respondent is bound. If the respondent signed the AOD without paying careful attention to its contents. The alleged mistake is one made by the defendant and is therefore unilateral.

For a debtor to avoid liability under an acknowledgment of debt, he must be able to show factors that negative consent such as duress, misrepresentation, undue influence or mistake. None of these elements have been proved. A person who signs a document is liable for the resulting consequences. The maxim *caveat subscriptor* is fully applicable to the circumstances of the case. In *Burger v Central African Railways* 903 TS 578@ 578, the court said the following of the concept,

> "It is a sound principle of law that when a man signs a contract he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature''

The concept entails that a person who signs a document has acquainted himself fully with its contents .When adult men of sound mind sign AODs they are taken to have acquainted themselves with the contents of the document. The respondent signed the AOD and by so doing led the applicant to believe that he was binding the respondent to the agreement. There was no misrepresentation, duress or any fraud that induced him to sign the AOD and hence he is bound by it. He is bound by the terms of the document he signed .He cannot be heard to complain. The respondent's claim that there is no valid cause of action and that he signed the AOD through a mistake lacks merit. I am satisfied that the respondent has no *bona fide* defence to the applicant's claim. The applicant has proved his case on a balance of probabilities. The claim succeeds.

In the result, I make the following order

1. Summary judgment be and is hereby entered in favour of the applicant against the respondent for the sum of US$170 292.26 together with costs of suit and the costs of suit in case no HC 9602/15 and interest at the rate of 5% per annum from the 30th of October 2015 .

*Messrs Kwirira & Magwaliba*, applicant's legal practitioners
*Messrs Ndlovu & Hwacha*, respondent's legal practitioners