

**PETER STAAK**

**Versus**

**DENNY DEANA ASHLEY DAVIES**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 7 FEBRUARY & 13 JUNE 2019

**Provisional Sentence**

*T. Tavengwa* for the plaintiff  
*N. Mangena* for the defendant

**TAKUVA J:** This is a provisional sentence matter. Plaintiff issued provisional sentence summons against the defendant claiming provisional sentence in an amount of US\$208 000,00, together interest at the prescribed rate from the date of acknowledgment of debt to the date of payment in full.

Plaintiff relies on an acknowledgment of debt allegedly signed by the defendant on 15 June 2017. Buoyed by what plaintiff believed to be a liquid document, he issued summons on 21<sup>st</sup> of September 2018. Upon service, the Sheriff endorsed the date of the 25<sup>th</sup> of October 2018. On that date, the defendant was supposed to appear in court to answer the claim. However on 16<sup>th</sup> of October 2018 defendant's legal practitioners filed a notice of opposition on behalf of their client. The notice of opposition was served upon the plaintiff's lawyers' corresponding practitioners on the 17<sup>th</sup> of October 2018.

On the date of hearing, i.e the 25<sup>th</sup> of October 2018 *Advocate S. M. Hashiti* appeared in court on behalf of the defendant. The plaintiff and his legal practitioners were not in attendance. In view of that and out of professional courtesy, *Advocate Hashiti* applied for the matter to be removed from the roll. Consequently, this court per MOYO J removed the matter from the roll.

Later, *Mr Tavengwa* for the plaintiff had the matter re-enrolled on the unopposed roll for the 9<sup>th</sup> of February 2019 on the basis that the notice of opposition was defective and therefore

legally there was no opposition. When the matter was called up in motion court, *Mr Mangena* for the defendant, applied for the matter to be removed from the unopposed roll as it was clearly opposed. *Mr Tavengwa* opposed the application insisting that the matter should remain and be treated as unopposed because of the defective nature of the notice of opposition.

Plaintiff's basis for contenting that the notice of opposition is invalid is that the defendant did not use the correct forms but rather invented his own format. The argument is that the opposing papers are headed "Notice of Filing" instead of notice of opposition. It is not denied that defendant filed an opposing affidavit. In my view, the notice of opposition is valid because the papers clearly show that the matter is opposed and the plaintiff has not been prejudiced in any manner by the alleged innovation by the defendant.

The second issue is whether or not an opposed matter for provisional sentence should be set down on the unopposed roll? This question has previously arisen in this court. MAKARAU J (as she then was) in *ZIMBANK v Interfin N Merchant Bank of Zimbabwe Ltd* 2005 (1) ZLR 114 (H) at 116F-117A, stated the following:

"It has always been the practice of this court to determine provisional sentence matters on the date appearing on the face of the summons. Issues of convenience to the court, which is essentially sitting as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submissions to court. I have not been able to conceive of any interpretation of the rules of this court that would tend to suggest that this is not the proper way of proceeding. I have further failed to conceive of any possible reason why the practice of this court should be changed to refer contested provisional sentences to the opposed roll as that course will effectively rob the "quick" remedy of its effect and thereby weaken the whole machinery of provisional sentence."

However, 8 years later in *A L Shama Global BVI Ltd v Equity Properties (Pvt) Ltd* 2013 (@) ZLR 131 (H). ZHOU J while deciding the fate of an opposed matter for provisional sentence stated:

“It as previously been held that the practice of the High Court is to determine provisional sentence matters on the date appearing on the face of the summons. Issues of convenience to the court, which is essentially sitting as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submissions to court. However, r223 (1) (a) provides for the setting down of uncontested cases for provisional sentence on the roll for unopposed matters. There is no provision in the rules for contested cases for provisional sentence to be set down on the same roll. The setting down of contested cases for provisional sentence on the “unopposed” roll is therefore not in accordance with the provisions of the rules ... The three courses of action available to the defendant are (a) to satisfy the claim; (b) to file opposing affidavits; or (c) to appear in court on the date stated in the summons or admit or deny the claim. Where a defendant chooses to appear in court on the date of the hearing to deny liability, it is only then that the court becomes aware that the matter is contested. But if the plaintiff becomes aware before the date of hearing that the matter is opposed he should not set it down on the unopposed roll.” (my emphasis)

See also *Mavindidze & Anor v Mukonoweshuro* 2010 (1) ZLR 191 (H); *Sibanda v Mushapandze* 2010 (1) ZLR 216 (H); *Spar Harare (Pvt) Ltd v Munava Enterprises & Ors* H-784-16

*In casu* the plaintiff became aware before the date of the hearing that the matter was opposed. Consequently, he should not have set the matter down on the unopposed roll.

In my view, while MAKARAU J’s views are noble in that they are consistent with the hallmarks of a brisk and robust remedy provisional sentence provides, currently, the unopposed motion roll is clogged with 60 to 70 cases (for Harare) and 40 to 50 cases for (Bulawayo) per week, making the option of standing down opposed matters for provisional sentence to the end of the roll inconvenient and burdensome to the presiding judge who must be satisfied before granting provisional sentence that the defendant has no probability of success in the principal case.

In order to do justice to these cases, they should be set down on the opposed roll.

In the circumstances, it is ordered that;

1. The matter is opposed.

2. The matter is removed from the roll of unopposed matters.
3. The Registrar is directed to set the matter down on the opposed roll.
4. There is no order as to costs.

*Gunje Legal Practice c/o M. R. Pertkar Law Firm, plaintiff's legal practitioners*  
*Coghlan & Welsh defendant's legal practitioners*