BEKI SIBANDA
versus
ELISHA K MUSHAPAIDZE

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 14 and 21 January and 24 March 2010.

OPPOSED APPLICATION

Ms D Mushambi for plaintiff
Mr M Ushe for defendant.

MAKARAU JP: On 6 July 2009, the applicant issued summons against the respondent, claiming provisional sentence in the sum of US$ 8 920-00 together with interest thereon at the rate of 5% p. a. reckoned from the date of the issuance of summons to date of payment in full.

In the summons, the plaintiff alleged that the claim was based on a letter written by the defendant's legal practitioners on 11 June 2009 in which the debt was allegedly acknowledged. A copy of the letter was attached to the summons.

The defendant did not satisfy the claim upon the provisional sentence summons being served on him. Instead, he filed a notice of opposition to which he attached an opposing affidavit. In the opposing affidavit, he took the point *in limine* that the letter by his legal practitioners of 11 June 2009 was not a liquid document in terms of the rules governing provisional sentence procedures. Regarding the merits of the matter, he averred that there was a dispute as to the correct amount owing and further that the debt was not yet due and payable. Finally he averred that he has a counterclaim against the plaintiff's claim.

The plaintiff filed an answering affidavit in which he denied most of the facts raised by the defendant in the opposing affidavit. in addition, the plaintiff maintained his position that the letter written by the defendant's legal practitioners was a liquid document as it contained an acknowledgment of indebtedness by the defendant in the amount of the claim.

It is appropriate in my view that at this stage I set out in some detail the contents of the letter that the plaintiff relied on in issuing provisional sentence summons in this matter. It reads:

"The above matter refers, and pertinent is your letter dated 4th of June 2009. We have since forwarded your proposal to our client. He has instructed us to inform you that he unfortunately has to decline to sign your acknowledgement of debt. There is no prudence in committing oneself to something that he has neither the ability nor the means to perform.

However, our client has also instructed us to increase his offer to pay off the balance to US800-00 per month. Should your client accept, ours is prepared to make the first payment immediately."

In the next paragraph, the legal practitioners make reference to certain schedules of payments that had been exchanged between the parties and high lighting the differences in these schedules. In the paragraph that follows, they wrote:

"If you calculate the total amount paid, according to your client's records, it amounts to US$4 830-00. If you look at annexure "C", which is a copy of the letter of demand sent to ours by yours, you will find that the payments made so far have been paged at US$5 730-00. Clearly your client's record of payments is inaccurate and unreliable. **Secondly, if you refer again to annexure "C" and calculate the amount owing with the figures as provided by your client on the letter of demand, you will find that there is a calculation error and the balance owing should actually be US$8920-00.** It is unclear where your client is getting the figure of US$5 730-00 because his records show payments of US$ 4 830-00."

(The emphasis is mine).

It is equally unclear to me what the various figures the parties were referring to represented as none of the schedules referred to in the letter were attached to the summons for provisional sentence. In issuing summons for provisional sentence, the plaintiff relied on the sentence in the letter by the legal practitioners which I have highlighted above as representing the acknowledgment of indebtedness by the defendant.

The issue that falls for determination in this matter is whether or not the letter written by the defendant's legal practitioners is a liquid document for the purposes of the provisional sentence procedure.

Order 4 Rule 20 of the High Court Rules 1971 provides that 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.

The term liquid document is not defined in the rules.

This court has however held that any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document. 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.

In *C.S.D Enterprises (Pvt) Ltd v S. & T. Import and Export (Pvt) Ltd and Others* 1980 ZLR 238 (GD), the court had to determine whether a written agreement of cession in terms of which the defendants had undertaken to liquidate the original debtor's debt by way of fixed monthly installments was a liquid document for provisional sentence purposes. In finding that the cession agreement was a liquid document, the court found firstly that a clear and unambiguous written promise to pay fixed monthly amounts constitutes a liquid document. In this regard, the court followed the decision in *Oostlike Transvaal Ko-Operasie Bpk v Kruger* 1958 (2) SA 329 (T) wherein a letter to pay a certain fixed monthly sum was held to be a liquid document to the extent that it contained a promise to pay the sum each month. It was the clear, unequivocal and unambiguous undertaking to discharge the indebtedness on a monthly basis in the *Oostlike* case that persuaded the court to hold that the letter offering the monthly payments was a liquid document. Likewise, in the CSD case, the learned judge found that there was little difference between the undertaking given in the *Oostlike* case and the undertaking to pay that was embodied in clause 2 of the cession agreement that was before him. It was his specific finding that the provisions of clause 2 of the cession agreement was a clear unequivocal and unambiguous undertaking binding the first defendant to liquidate a definite indebtedness which came into being when the cession agreement was signed.

In *casu*, it appears to me that the letter attached to the summons for provisional sentence is part of an exchange of correspondence where the amount of the indebtedness was in dispute and was being debated as between the parties. To that extent, the amount of the indebtedness was not certain or definite. Further, it also appears to me that in the letter, the defendant's legal practitioners were challenging the calculations done by the plaintiff. They instead offered his own calculations and the resultant balance outstanding which was different from the amount demanded by the plaintiff. To this extent, I view the letter as more of an arithmetical upstaging exercise of the plaintiff by the defendant's legal practitioners rather than an unequivocal acceptance by the defendant that this was the sum outstanding and that he was promising to liquidate it.

It is therefore my finding that the letter attached to the summons was not a clear underrating to pay any amount accepted as outstanding. It was fairly ambiguous as one cannot tell whether the defendant's legal practitioners were merely showing that the correct calculations on plaintiff's own figures would give a different result or were actually giving the correct calculations and the correct amount owing.

I have considered whether the offer made by the defendant to increase his offer to $800-00 per month can be considered as a clear, unequivocal and unambiguous undertaking to pay off the debt as was held in the *Oostlike* case. I have compared the language that was used by the defendant in that case and the language used by the defendant's legal practitioners in this case. In that case, the defendant personally wrote:

"With reference to our discussion in connection with the above amount, (the sum of $185.13.9.), I wish to confirm that I will pay to you a minimum of $5 per month with interest at 6 per cent. Enclosed please find a cheque for an amount of $ 5 being payment for July 1952."

(For $ read pound).

I agree that the above constituted a clear and unequivocal undertaking to pay off the amount of the debt at the rate stated. In contrast, the defendant before me made a conditional offer to settle the debt at the rate of $800-00 per month on condition the plaintiff accepted the offer. In my view, the offer was equivocal to the extent it would be considered binding upon the parties if the plaintiff found it acceptable.

Apart from the equivocal offer to settle the debt at $800-00 per month, I do not read the letter as containing any other undertaking to pay off the debt.

On the basis of the foregoing, I will hold that the letter attached to the plaintiff's summons for provisional sentence is not a liquid document. Accordingly, I decline provisional sentence in this matter.

Assuming that I have erred in refusing to hold the letter as a liquid document, I still would have declined provisional sentence in this matter on another basis.

From the correspondence that the parties attached to the pleadings in this matter, it is common cause that the transaction giving rise to the dispute between the parties was a sale of certain equipment. The sale was concluded in September 2008. The equipment was sold for US$14 650-00. This was prior to the date when the exchange control authorities allowed the use of foreign currencies for ordinary trade within the jurisdiction and thus the agreement fell foul of the relevant foreign exchange regulations of the time that prohibited individuals from exchanging goods or services for foreign currency without prior approval of the exchange control authorities. In this regard, the transaction between the parties was tainted with illegality. (See *Matsitka v Jumvea Zimbabwe (Private) Limited and Another* 2003 (1) ZLR 71 (H)).

It is the settled position at law that where the court is faced with an agreement that is tainted by illegality, the court may allow the loss to lie where it falls, or may relax the rule

against illegality to do justice between the parties. Whether to allow the loss to lie where it falls or to relax the rule against illegal agreements to do justice between the parties is an issue to be determined at the trial of the matter and cannot be debated at provisional sentence stage. 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 procedure for decades.

In taking the above approach I am guided by the remarks by PRICE J in *Allied Holdings Ltd v Myerson* 1948 (2) SA 961 (W) where at 968 he had the following to say:

> "It is recognized, of course that a liquid document, which on the face of it, speaks unequivocally, must have the story of the transaction behind it and that an investigation into that story may show that the is not liable in terms of the liquid document; but once we go behind the liquid document the onus is on the defendant to show that if evidence were heard the probabilities are that he would succeed."

In *casu*, it is not in dispute that the agreement antecedent to the alleged liquid document was a sale of equipment for United States dollars at a time when the legal tender for all transactions within the jurisdiction was the local currency. The defendant, whilst not denying the letter, is in my view going behind the letter to show that the antecedent transaction was tainted with illegality and may be unenforceable against him.

It is my view that provisional sentence may not be granted on a liquid document that embodies an illegal agreement as to do so is tantamount to lending legality to the agreement albeit provisionally.

On the basis of the foregoing I would have declined provisional sentence in the matter.

In the result, I make the following order:

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

Gula-Ndebele and Partners, plaintiff's legal practitioners.

Muchineripi and Associates, defendant's legal practitioners.