

NESTLE ZIMBABWE (PVT) LTD
versus
ALLEN WACK & SHEPHERD (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 3 October 2019 & 4 October 2019

Provisional Sentence

O Kondongwe, for the plaintiff
N Chikoore, for the defendant

ZHOU J: This is a claim for provisional sentence. The claim is founded upon an acknowledgment of debt in terms of which the defendant acknowledged indebtedness to the plaintiff in the sum of US\$3 118 287.17. The acknowledgment of debt was signed on 25 October 2018. In terms of the acknowledgment of debt the defendant undertook to liquidate the debt in monthly instalments of US\$300 000. It is common cause that the defendant defaulted in making the monthly instalments, which caused the plaintiff to issue the summons for provisional sentence.

The defendant contests the plaintiff's claim on two grounds. The first ground of opposition is that there was an error in the calculation of the amount due to the plaintiff by it. It submits, on that basis, that the amount due to the plaintiff ought to be US\$1 425 623.87 and not that which is stated in the acknowledgment of debt. The second ground of opposition is that of set-off. In this respect the defendant states that it is owed a sum of US\$593 157.31 by the plaintiff in respect of services rendered to the plaintiff.

The procedure of provisional sentence provides a creditor who is armed with a liquid document with a speedy remedy for the recovery of money due without incurring the expense and delay of waiting for a trial. The purpose of the procedure is to enable the plaintiff to obtain an enforceable provisional judgment quickly and expeditiously without having to wait for the

final determination of the dispute between the parties, see *Richamn v Ben-Tovim* 2006 (2) SA 591 (C) at 598; *F O Kolberg (Pty) Ltd v Atkinson's Motors Ltd* 1970 (1) SA 660 (C) at 662 C-E.

Once the creditor is armed with a liquid document, viz a document in which the debtor has acknowledged, or is in law deemed to have acknowledged, his indebtedness to the creditor in a fixed or determinate sum of money, a rebuttable presumption of indebtedness arises, see *Cilliers et al*, Herbstein & van Winsen *The Civil Practice of the High Court of South Africa* 5 ed, p 1313. *In casu* the liquid document is the acknowledgment of debt duly signed by the defendant.

The allegation by the defendant that there was an error in the calculation of the amount stated in the liquid document is not sustainable. Firstly, it is clear that the cause of action is founded upon the acknowledgment of debt and not on any money calculated. The calculations or recalculations done are irrelevant at this stage. Secondly, the defendant agreed to settle the acknowledged debt. At no time did it challenge the figure in the acknowledgment of debt prior to being in default. It went on to default on the obligations arising out of the acknowledgment of debt which shows that it consistently accepted that the debt was due. It was only after being sued that the defendant sought to challenge the amount in the liquid document. This shows lack of good faith. In any event the defendant has not paid even that which it admits owing in its opposing affidavit.

The defence of set-off is available where the defendant is owed a debt by the plaintiff which then extinguishes the plaintiff's claim. The amount owed by the plaintiff to the defendant must be definite or readily ascertainable. In the present case the amount which the defendant claims to be owed is not certain. Defendant will need to produce evidence of the services rendered, the charges raised and the total which it claims to be owed. On account of the failure to meet the requirement of certainty in the amount owed to the defendant by the plaintiff, the defence of set-off cannot be invoked.

In all the circumstances of this case the plaintiff is entitled to the relief sought in the draft order.

In the result IT IS ORDERED THAT:

1. Provisional sentence be and is hereby granted against the defendant for:
 - a) payment of the sum of US\$3 118 287.70 plus interests thereon at the prescribed rate calculated from 1 November 2018 to the date of payment in full.
 - b) payment by the defendant of costs of suit on the legal practitioner and client-scale.

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Gwaunza & Mapota, defendant's legal practitioners