

RUMBIDZAI BUSHU  
versus  
TAWANDA DENFORD BONDAMAKARA

HIGH COURT OF ZIMBABWE  
MUSITHU J  
HARARE: 29 & 31 May and 10 June 2024 and 10 October 2024

### **Provisional Sentence Claim**

*A Kalira*, for the plaintiff  
*H. Magadure*, for the defendant

**MUSITHU J:** The plaintiffs claim herein is for provisional sentence in the sum of US\$203, 000.00, together with interest on that amount at the agreed rate of 5% per month calculated from 1 May 2021 to the date of payment in full and costs of suit on the attorney and client scale. The parties appeared before me in the unopposed motion court on 29 May 2024. The defendant had filed a notice of opposition to the claim prior to their appearance. They requested time to further engage with the hope of reaching an amicable settlement. I postponed the matter to 31 May 2024, to allow them more time to engage. On 31 May 2024, the parties returned advising that the prospects of settlement were remote. They agreed to file heads of argument to further motivate their respective positions. The matter was further postponed to 6 June 2024 for arguments. On that date, the parties opted to let the court determine the matter on the papers.

The plaintiff's claim arose from an acknowledgment of debt signed by the defendant in favour of the plaintiff on 7 May 2021. In terms of that acknowledgment of debt, the defendant admitted owing the plaintiff a sum of US\$215, 000.00 together with interest at the rate of 5% per month reckoned from 1 May 2021.

Further, in terms of the said acknowledgment of debt, the defendant undertook to clear the debt through monthly instalments of US\$20, 000.00 commencing on 31 May 2021. The defendant also undertook to hypothecate a piece of land measuring 5, 000 square metres held under parent deed 3413/73, upon finalisation of the relevant paperwork by his legal practitioners, Zuze Law Chambers.

According to the plaintiff, the defendant defaulted in making such payments after he only paid an amount of US\$12, 000.00 leaving an outstanding balance of US\$203, 000.00, which amount remained due and payable despite demand. It was on that basis that the plaintiff approached the court under a provisional sentence summons.

The claim was opposed by the defendant, who in his opposing affidavit alleged that the plaintiff forced him to sign the acknowledgment of debt with threats of criminal prosecution. The defendant averred that the claim based on the acknowledgment of debt was incompetent because it was procured through duress. He signed the document out of fear of losing his liberty. Attached to the opposing affidavit were two charge sheets and an outline of the State case, containing two counts of fraud against the defendant as the accused person. The allegations were that the defendant had made some representations to the plaintiff that he was selling some vacant industrial stands, which representations turned out to be false thereby causing financial prejudice to the plaintiff.

The defendant also alleged that despite signing the acknowledgment of debt, he was still arrested in September 2021 after refusing to pay the acknowledged amount. He claimed to have been released on bail under CRB No. 8627/21. He was removed from further remand on 11 January 2024, and the criminal matter remained pending. The defendant also averred that the amounts claimed in the acknowledgment of debt were different from the amounts that the plaintiff claimed to have lost when she made her criminal complaint.

The defendant denied owing the plaintiff anything insisting that he only made the undertakings because of the pressure brought to bear upon him. The amount he acknowledged to be owing was way above the amount that the plaintiff was allegedly defrauded in the criminal matter. He further expressed his intention to file a counterclaim seeking the setting aside of the acknowledgment of debt which he claimed was a nullity.

The opposing affidavit elicited an answering affidavit from the plaintiff who denied the allegations of duress made by the defendant. While admitting making a criminal complaint to the Police Anti-Corruption Unit, the plaintiff averred that the defendant was interviewed by the Police on the allegations some months before he signed the acknowledgment of debt.

The plaintiff further argued that if at all any threats of arrest and prosecution were made, such threats would not amount to duress because they were premised on lawful processes. Such lawful processes were undertaken by independent functionaries who acted in terms of the law. The plaintiff averred that it was the defendant who contacted her in 2021, expressing his

willingness to settle the debt arising from the fraudulent sale of non-existent industrial stands to the plaintiff. The plaintiff engaged Chizengeya, Maesera & Chikumba Legal Practitioners who then drew the acknowledgment of debt based on the defendant's own terms. The defendant attended at the offices of the said legal practitioners and voluntarily signed the acknowledgment of debt. The defendant even went on to make several cash payments towards the liquidation of the acknowledged debt.

### **The Analysis**

The remedy of a provisional sentence is provided for in rule 14 of the High Court Rules, 2021, which states as follows:

***“14. Provisional sentence***

(1) Where the plaintiff is the holder of a valid acknowledgment of debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document.”

The remedy provides the holder of an acknowledgment of debt with a far more expeditious and convenient way of recovering a debt that is incontestable. It is for that reason that r 14(6) provides that:

“(6) Matters for provisional sentence shall be set down on a roll assigned for such matters not being a day assigned for unopposed matters and shall be disposed of as expeditiously as possible having regard to the nature of the remedy of provisional sentence.”

In *Mutemererwa v Munyeza & Ano*<sup>1</sup>, MANGOTA J explained a liquid document in the context of an acknowledgment of debt as follows:

“*Sibanda v Mashingaaidze*, HH 56/2011 defines liquid document to mean any clear, unequivocal and unambiguous promise to pay a debt. The words ‘unequivocal’ and ‘unambiguous’ presuppose that the document may, or may not, be equivocal and/or ambiguous. *First Merchant Bank of Zimbabwe Ltd v Forbes Investments (Pvt) Ltd & Anor*, 2000 (2) ZLR 221 (S) lays down three considerations which define the meaning and import of the phrase ‘a valid acknowledgement of debt’. These are that:

- i) the acknowledgement must have been made by the debtor;
- ii) there must be express or tacit acknowledgement of the existence of liability –and
- iii) the acknowledgement must have been made in favour of the creditor or his agent.”

The defendant's objections must be considered with the above requirements of the law in mind. The defendant does not deny that he signed the acknowledgment of debt that the plaintiff relies upon. His contention is that he signed the document under duress. He yielded to the plaintiff's demands for fear of arrest and incarceration. The acknowledgment of debt was

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<sup>1</sup> HH 437/23 at p 3 of the judgment

signed on 7 May 2021. The witness statements that are attached to the State papers that form annexures to the defendant's notice of opposition show that by the time the acknowledgment of debt was signed, a criminal complaint had long been lodged against the defendant with the Anti-Corruption Unit of the Police Criminal Investigation Department. The plaintiff's statement was recorded on 20 February 2021. Another statement was recorded from one Jephious Chando on 23 March 2021. Delroy Murwira and David Kudakwashe Chikumba also had their statements recorded by the same Unit in connection with the same criminal complaint on 26 March 2021.

In her answering affidavit, the plaintiff made reference to payments that were made by the defendant through his legal practitioners of record. On 9 November 2022, the defendant made a payment of US\$5, 000.00. This payment was followed by two further payments of US\$ 5,000.00 and US\$2, 000.00, which made on 21 April 2023 and 18 July 2023 respectively. The plaintiff was made to sign an acknowledgment of receipt of the said payments which was prepared on the letterhead of the defendant's legal practitioners. Part of the acknowledgment of receipt read as follows:

"I the undersigned RUMBIDZAI BUSHU....do hereby acknowledge receipt of ....., being payment of the money owed to me by TAWANDA BONDAMAKARA which I accept without prejudice to my rights at law, from MAGADURE LEGAL PRACTICE..."

In his supplementary opposing affidavit, the defendant sought to distance himself from these payments averring that he never instructed his legal practitioners to make any payments towards the liquidation of the debt as acknowledged. He explained the payments as being in respect of some other financial deals that he had with the plaintiff. Those financial deals were however not explained. What is critical to note is that the opposing affidavit was prepared by the same legal practitioners from whom the plaintiff collected the payments. It was the same legal practitioners that the defendant accused of having made the payments without his consent.

The defendant's version of events sounds fanciful and more like a fairy tale. It is not in dispute that at the time of making these payments, the defendant had already been reported to the police for fraud. He had already been arrested and interviewed by the police. The last two payments were made in 2023, almost two years after the criminal complaint had been made, and after the signing of the acknowledgment of debt. During that time, the defendant had the benefit of legal representation, and nothing was placed before the court to show that he challenged the acknowledgment of debt. In para 13 of his opposing affidavit, the defendant hinted that he intended to *"file a counterclaim seeking the setting aside of that Acknowledgment*

*of Debt as it is vitiated by duress.*” At the time of preparing this judgment, no such claim had been made to this court.

The opposing affidavit was filed on 14 May 2024, more than three years after the acknowledgment of debt was signed. The overall conduct of the defendant does not impress as that of a person who was under pressure at all. The amount that he acknowledged owing was very significant and any person in their right mind, and who had the benefit of legal representation would have challenged that document. Further, there is nothing to suggest that by the time the said payments were made, the defendant was under any pressure at all. When the present claim was made, the defendant was just content with responding to the claim. He did not consider it necessary to challenge the acknowledgment of debt that left him saddled with such a huge financial burden.

It is for the foregoing reasons that the court determines that the plaintiff’s claim is unassailable and must succeed. The defendant’s story is scarcely credible and highly implausible.

As regards costs of suit, the plaintiff’s counsel urged the court to grant provisional sentence with an order of costs on the punitive scale. It was submitted that the defendant’s defence was not *bonafide* and was tantamount to an abuse of court process. I agree with the plaintiff’s submission. This court must preserve the integrity of its processes by discouraging such conduct that borders on an abuse of its processes. An adverse award of costs on the punitive scale is one such measure that discourages abusive conduct.

**Resultantly it is ordered that:**

1. Provisional sentence is hereby granted in favour of the plaintiff.
2. The defendant shall pay the plaintiff an amount equivalent to US\$203, 000.00 in local currency at the prevailing interbank rate on the date of payment.
3. The defendant shall pay interest on the amount stated in paragraph 2 above at the agreed rate of 5% per annum from 1 May 2021 to the date of payment in full.
4. The defendant shall pay the plaintiff’s costs of suit on the attorney and client scale.

MUSITHU J:.....

*Musengi & Sigauke*, legal practitioners for the plaintiff  
*Magadure Legal Practice*, legal practitioners for the defendant