ZIMBABWE TEACHERS ASSOCIATION
(MASHONALAND WEST)
versus
THOMAS NYAMUDZOZA
and
TINARWO TIVARINGIRE
and
FOCUS LINE HOUSING AND DEVELOMENT TRUST

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 29 July, 8 September 2020 & 7 October 2022

Opposed Application – provisional sentence

Mr S Kachere, for the plaintiff
Defendants in person

CHINAMORA J: The facts of this matter are that, on 1 June 2020, the plaintiff issued summons for provisional sentence claiming US$155,138-75 based on an acknowledgment of debt signed by the defendants in favour of the plaintiff on 31 January 2020. In terms of this document, the defendants undertook to pay the aforesaid sum of US$155,138-75 or its equivalence at the prevailing interbank rate on or before 31 March 2020. This is contained in paragraph 1 of the acknowledgment of debt, which appears as Annexure "A" on p 5 of the record.

Although the matter initially came on the unopposed roll in motion court on 29 July 2020, the defendants turned up to oppose the granting of the claim. I deferred the hearing and subsequently heard argument. I perceived that two issues merited consideration, namely:

1. Whether the acknowledgement of debt seeks to circumvent the effects of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019 (hereinafter referred to as "SI 33of 2019") or the Supreme Court judgment in *Zambezi Gas Zimbabwe (Pvt) Ltd* v *NR Barber (Pvt) Ltd and Anor* SC 3-20 to the extent that it was signed for the same amount owed to the Plaintiff, but now expressed in United States dollars.

2. Does an acknowledgment of debt constitute a new cause of action entitling a court to ignore how the debt arose. In *casu*, the loan for which provisional sentence was sought arose before the effective date (set in SI 33/19), being February 2019. The same obligation was then reduced into an acknowledgement of debt expressed in United States currency.

An advocate in private practice had agreed to act as *amicus curiae* and assist the court to resolve the above issues. However, no heads were received and I now proceed to determine the case without the input of *amicus curiae*. From the papers before me, I observe that the defendants confirmed that they were lawfully indebted to the plaintiff in respect of money advanced towards the purchase of residential stands and costs of agreements of sale. In addition, paragraph 2 (b) of the acknowledgment of debt states:

> "The debtors hereby renounce the benefits of the legal exceptions *non causa debiti*, *non numerata pecuniae*, errori *calculi*, revision of accounts, no value received and any other exceptions which might or could be taken to the payment or indebtedness of the debtors to the creditor, with the full meaning and effect whereof the debtors hereby declare to be fully acquainted".

In order to grant or refuse the relief sought by the plaintiff, in my view, the starting point is Rule 14 (1) of the High Court Rules, 2021, which provides:

> "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 acknowledgment of debt leaves no doubt that the plaintiff's claim is based on a liquid document. Generally, in the absence of evidence to show that the acknowledgment of debt is invalid, the relief should be afforded. This was emphasized by this court in *Caltex (Africa) Ltd* v *Trade Fair Motors and Anor* 1963 (1) SA 36 (SR), where the court stated that if the acknowledgment of debt is sufficiently clear and certain and no evidence to the contrary has been provided, provisional sentence will be granted. In *casu*, the defendants did not deny signing the acknowledgment of debt, nor did they say that they signed the document under duress or some other undue influence put on them. Having put their signatures on the acknowledgment of debt, *ex facie* that document, the defendants acknowledged liability to pay the amount of US$155,138-75. Thus, I have to consider whether the issues I have stated above affect, in any way, the liability for acknowledged debt. These issues raise the question whether or not I should look at the background facts. It will be necessary, in answering this

question, to examine the meaning and effect of the exceptions which the defendants expressly renounced.

The law on acknowledgments of debt is settled in this jurisdiction. In *Barend van Wyk* v *Tarcon (Pvt) Ltd* SC 49-14, the court said the following of claims premised on an acknowledgment of debt signed subsequent to the original transaction:

> "...it is competent to sue a debtor on his admission of liability as set out in an acknowledgement of debt, without founding the action on the original transaction giving rise to that acknowledgement. See *Mahomed Adam (Edms) Beperk v Raubenheimer* 1966 (3) SA 646 (TPD)."

What emerges from the authority above is that, it is competent for a litigant to base his claim on an acknowledgment of debt without making any reference to the underlying contract or transaction which birthed it. Thus, the clear imperative of the law is that when dealing with provisional sentence founded on acknowledgment of debt, a court is not required to investigate the terms of the underlying agreement or transaction. In the circumstances, I find it unnecessary to consider whether or not the acknowledgment of debt was an attempt to circumvent SI 33 of 2019. As I said, the defendants signed the document, which incorporated exceptions which could have helped them to escape liability, and have not alleged that they did so involuntarily. There is no reason, in my view, for the *caveat subscriptor* rule not to apply. I rely in this connection on *Muchabaiwa* v *Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691(SC) where the court stated the *caveat subscriptor* rule as follows:

> "The general principle which applies to contracts, and commonly designated as caveat subscriptor, is that a party to the contract is bound by his signature, whether or not he has read or understood the contract, or the contract was signed with blank spaces later to be filled in. Expatiating on this principle in *National and Grindlays Bank* v *Yelverton* 1972 (1) RLR 365 (G) at 367; 1972 (4) SA 114 (R) at 116G-H, DAVIES J cited with approval the following statement by INNES CJ in *Burger* v *Central South Africa Railways* 1903 TS 571 and 578".

I will now consider the effect of excluding the exceptions when the defendants signed the acknowledgment of debt. By signing it the defendants acknowledged their liability to the plaintiff as at 31 January 2020, and in terms of clause 1.1 of the acknowledgment of debt, the entire amount of US$155,138-75 became due and payable.

In conclusion, I restate the trite position at law that the general principle is that provisional sentence summons will be granted where the acknowledgment of debt is clear and certain in the absence of evidence to demonstrate anything to vitiate it like duress. I therefore grant an order in the following terms:

1. Provisional sentence in the sum of US$155.138-75, or the equivalence at the prevailing interbank rate, be and is hereby granted.
2. Defendant shall pay interest on the sum of US$155,138-75 at the prescribed rate (currently 5% per annum) from 31 March 2020 to date of payment in full.
3. The Defendant shall pay costs of suit on the legal practitioner and client scale.

Kachere Legal Practitioners, plaintiff's legal practitioners