NYASHA MUDONHI
versus
ISABEL NYOKA

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 25 February & 28 September 2022

Opposed Application

Adv D Sanhanga, for plaintiff
Mr C Chirere, for the defendant

CHINAMORA J:

On 11 June 2021, the plaintiff issued a summons for provisional sentence claiming the amount of US$295,102-00 based on an acknowledgment of debt signed by the defendant in favour of the plaintiff on 9 April 2021. In terms of this document the defendant undertook to pay the sum then owing to the plaintiff in the sum of US$445,102-00 in full on or before 16 April 2021. This is contained in paragraph 2 of the acknowledgment of debt, which appears as Annexure "A" on page 3 of the record. The claim was opposed by the defendant.

The matter was set down on the unopposed roll on 30 June 2021. As the defendant's legal practitioner did not attend court on said date, the defendant successfully applied for postponement of the matter to enable her lawyer to represent her. As a result, the matter was postponed to 14 July 2021. In the meantime, the defendant filed her opposing affidavit (which is on pages 10-11 of the record) in which she averred that there was an illegality surrounding the acknowledgment, and that she had signed it as a result of undue influence. In this regard, in paragraphs 3.1, 3.2 and 3.3 the defendant set out her defence as follows:

> "3.1 The acknowledgment of debt attached to the summons is tainted with illegality. Clause 3 thereof states that the sums to be paid shall be in United States dollars only and not any other currency, equivalent or as a substitute. This clause is illegal since Zimbabwean dollar is a legal currency in Zimbabwe.
>
> 3.2 I am advised, which advice I do take that where illegality of a document is called into question, such an inquiry cannot be made at provisional sentence stage, but can only be determined at the trial of the matter.
>
> 3.3 Further, undue influence was brought to bear upon me to sign the acknowledgment of debt. In actual fact the money I borrowed from the plaintiff is the sum of US$175,000-00 and by 16 April 2021, I had paid a total of US$150,000-00. However, on 9 April 2021, I was

> unduly influenced to sign the acknowledgment of debt and the plaintiff is aware of the influence.
>
> 3.4 Plaintiff demanded that I must sign the acknowledgment since the money was not his but belonged to some senior political members and I was threatened with disappearance".

The plaintiff filed an answering affidavit (which is on pages 14-16 of the record), asserting that there was no illegality arising from money being paid in United States dollars as this the currency in which the money was loaned. In addition, the plaintiff denied that the defendant was unduly influenced. He averred that the defendant had always been represented by lawyers from the time demand was made, but at no point did he raise this issue. In fact, the plaintiff submitted that the defendant's lawyers responded to his demand on 7 June 2021 (which appears on page 17 of the record), which letter did not raise the question of undue influence, but stated that the parties had discussed extension of time to pay back the loan. The said letter, *inter alia*, reads:

> "Our client informed us that the parties agreed that there is need for time to refinance the loan through a long term bank loan. In terms of that agreement, our client has applied for a bank loan and the application is under consideration. Our client has been engaging with yours since then and the parties were happy with the arrangement".

He added that, on 29 June 2021, the defendant through her lawyers made payment proposals based on a facility extended to her by First Capital Bank. The plaintiff also attached a letter from the plaintiff's lawyers to defendant's lawyers dated 30 June 2022 (which appears on page 18 of the record), in which the following passage appears:

> "To avoid a further delay in the resolution of the matter, we kindly urge you to encourage your client to settle, more so in light of yesterday's discussion between your Mr Chipere and the writer wherein he advised that your client is requesting time to pay - which time he indicated was based on your client drawing down on a loan facility which was advanced to her by First Capital Bank, We attach hereto a copy of the loan facility agreement you shared with us in this regard".

A copy of the loan facility agreement is on pages 20- 23 of the record.

From the papers before me, I observe that the issue of undue influence and illegality of paying the debt in United States currency was raised for the first time in the opposing affidavit signed by the defendant on 7 July 2021 and filed with this court on the same day. After hearing argument from the parties' respective legal practitioners, I had no hesitation in granting the relief sought by the plaintiff.

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".

It is apparent that the plaintiff's claim is based on a liquid document. Unless the acknowledgment of debt is shown to be invalid, the relief should be afforded. The defendant did not deny signing the acknowledgment of debt nor did he deny his signature. Her defence is that she was unduly influenced to sign it as she was threatened with "disappearance". As I have already noted, the issue of undue influence was only raised on 7 July 2021, despite the document having been signed on 9 April 2021. The defendant, assuming she was pressurised to sign the acknowledgment of debt, could have informed her lawyers of this when she first consulted them. The letters exchanged between the lawyers do not mention duress at all, but confirm that the defendant wanted time to pay, and even gave her lawyers authority to show the plaintiff's lawyers the loan facility agreement she had signed with First Capital Bank. It is clear that this was done in order to convince the plaintiff that she was able to pay back the loan if she was given time to pay. The defendant could have made a report to the police since a threat to make someone disappear is a serious one. None was shown to have been made. The onus to prove the undue influence was on the defendant based on the age old principle of *"*he who alleges must prove*"*. See *ZUPCO* v *Packhorse Services (Pvt) Ltd* SC 216-13. The requirements for undue influence are settled in this jurisdiction and South Africa, and I need only rely on the decision in *International Export Trading Company Zimbabwe (Pvt) Ltd* v *Mazambani* HH 195-17, where DUBE J (as she then was) stated:

> "…a litigant wishing to rely on duress and undue influence as a ground for resisting enforcement of an AOD must do more than just allege that he was forced to sign the AOD. He must convince the court that the pressure applied upon him to coerce him to sign was so extreme or severe so as to negative voluntariness and induced him to sign the document without his free will. The influence averted to must be shown to be unscrupulous and that it weakened his power to resist. Further, that he would ordinarily not agree to the signing. He must show that he protested and took steps to avoid the forced action or contract. The threats alleged must be proved to be the motivation for the signing and the threat must be of some imminent or an inevitable evil. The defendant's fear must be reasonable.

I fully endorse the learned judge's exposition of the law. The approach under South African law is the same, and it is relevant to refer to *Patel* v *Grobbelaar* 1974 (1) SA 532 (AD). In light of the standard set by the authorities I have referred to, I find that the allegation

of duress was not substantiated, which means the acknowledgment of debt cannot be faulted on the ground of undue influence.

Turning to the ground of illegality also raised by the defendant, I will rely on the decision of our Supreme Court in *Cold Chain Ltd* v *Makoni* SC 9-12, which accepted the principle that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuation in the purchasing power of the currency. At any rate, the liquid document was executed before the Presidential Powers (Temporary Measures) (Financial Laws Amendment) Regulations, SI 127 of 2021 came into force. In this context, I am mindful that there is presumption giving the law a retrospective construction. See *Nkomo and Anor* v *The Attorney-General and Ors* 1993 (2) ZLR 422 (S) at 429A-C and 433C. I therefore do not find any illegality that taints the acknowledgment of debt in the lawsuit before me. I found no merit in the defence to the claim and exercised my discretion to award costs on the higher scale of legal practitioner and client. In any event, paragraph 10 of the acknowledgment of debt provides for costs at that scale if litigation ensued.

In conclusion, I must say 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. It is for the reasons set out above that, on 25 February 2022, I granted an order in the following terms:

1. Provisional sentence in the sum of US295, 102-00 be and is hereby granted.
2. Defendant shall pay interest on the sum of US$295,102-00 at the prescribed rate (currently 5% per annum) from 17 April 2021 to date of payment in full.
3. Defendant shall pay collection commission in terms of the Law Society of Zimbabwe By-Laws.
4. The Defendant shall pay costs of suit on the legal practitioner and client scale.

Mangwiro Tandi Law, plaintiff's legal practitioners
Charamba & Partners, defendant's legal practitioners