SPAR HARARE PRIVATE LIMITED
t/a Spar Eastern Region
versus
MUNAVA ENTERPRISES (PRIVATE) LIMITED
and
BERTHA TARIRO MUZANHENHAMO
and
BARBRA RUPERE
and
WINNET MUZANENHAMO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 24 November & 7 December 2016

Opposed application

M Ngongoni, for the applicant
T Biti, for the respondent

TSANGA J: Spar Harare as plaintiff (applicant herein), issued summons for provisional sentence for a claim of USD 422 262.28 based on an acknowledgment of debt as per letter which contained set terms of payment. It was written on the 26th of January 2016 by Bertha Muzanhenhamo the second defendant in her capacity as director of the first defendant Munava Enterprises Private Limited, (Munava Spar). The debt is in respect of goods which were supplied by Spar Harare to Munava Spar on credit, in terms of a signed credit facility agreement executed by Bertha Muzanhenhamo on behalf of Muneva Spar. As security for the debt and credit facilities Bertha Muzanhenhamo bound herself as co-principal debtor under a surety bond on immovable property called stand 7 Midlands Township of Midlands measuring 2834 sq. meters, held under title deed of Transfer 5127/2004, dated 28 June 2004.

The application for provisional sentence was placed on the unopposed roll on the 8th of June 2016. A notice of opposition had been filed on the 1st of June before the hearing date. The opposing affidavit was sworn to by Joyce Muzanhenhamo in her capacity as chairperson of Munava Spar. She is the mother to Bertha Muzanhenamo and other children who had been initially made part of the claim by Spar Harare. She basically explained that when her husband died in 1996, the property in question was bequeathed to her five children, two of whom are now late. During her husband's life time they had been running a business at the property in question. A franchise agreement was entered with Spar in 2006. They entered into

a franchise agreement. Her affidavits narrated the challenges that Munava Spar has faced in light of the economic situation and competition from a flurry of lower priced retailers. The deponent also questioned the amount claimed as not being legitimate and that the amount claimed is nowhere near the amount claimed. She averred that an audit and reconciliation must take place to establish the proper amount outstanding. She further stated that as Chairperson she had not authorised the letter that was written by Bertha Muzanhenhamo and said that it is not an acknowledgment of debt. (Bertha Muzanhenhamo stood surety for the debt). She also stated that she was unaware of the surety bond and accused the plaintiff of fraud as two of her children who were owners of the property passed away and could not have passed the surety bond. Proceedings against the two deceased children were however withdrawn by the plaintiff before the 8th of June 2016. She prayed for a dismissal of the summons for provisional sentence. Accordingly, on the day of the hearing the matter was removed from the unopposed roll as confirmed by the result slip attached to the file for that day.

Thereafter the plaintiff filed its answering affidavit on the 4th of July querying the deponent's standing. Plaintiff's position was that the averments did not disclose any cause of action particularly as the first and second defendants had still bound themselves jointly. The plaintiff filed its heads of argument on the 14th of July 2016 which were served on the defendant's practitioners on the same day. The certificate of service is accordingly date stamped 15 July 2016. Notice of set down of the matter on the opposed roll was served on the defendant's legal practitioners on the 18th of July and the registrar's date stamp is 19 July 2016. Some three months later the defendants' filed their heads of argument which are date stamped 25th October 2016.These heads raised the issue of the constitutionality of provisional sentence on the basis that the case of *Tetrad Investment Bank* v *Largedata Enterprises Private Limited* HH 730-15 which said that provisional sentence is constitutional was wrongly decided.

At the hearing of the opposed matter on the 24th of November 2016, the plaintiff's counsel, Ms *Ngongoni*, sought an order for provisional sentence on the basis that the defendants were barred since their heads of argument well out of time and no condonation had been sought. Mr *Biti,* who appeared on behalf of defendants as respondents herein, denied that they were barred and said he had a point *in limine* to raise. Its gist was that the rules governing provisional sentence matters make no provisions for heads of argument. In view of 25(1) of the High Court Rules, 1971 which permits the filing of a notice of

opposition to a summons for provisional sentence, he further put forward the argument that the wrong procedure for an application for provisional sentence had been followed in motion court when the matter appeared on the roll on the 8th of June 2016. He asserted that the matter should have been rolled over to the end of the roll for arguments to be heard on the merits or otherwise of the provisional sentence application. In the event of the plaintiff not succeeding in the application, his position was that the matter would then have proceeded as a trial matter. He had, however, not been in motion court on the day in question and had sent his assistant. He relied on the case of *Zimbank* v *Interfin Merchant Bank of Zimbabwe Ltd* 2005 (1) ZLR 114 (H) in which MAKARAU J as she then was, expressed the following sentiments on provisional sentence matters that are opposed:

> "It has always been the practice of this court to determine provisional sentence matters on the date appearing on the face of the summons. Issues of convenience to the court, which is essentially sitting as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submissions to court. I have not been able to conceive of any interpretation of the rules of this court that would tend to suggest that this is not the proper way of proceeding. I have further failed to conceive of any possible reason why the practice of this court should be changed to refer contested provisional sentences to the opposed roll as that course will effectively rob the "quick' remedy of its efficacy and thereby weaken the whole machinery of provisional sentence"

However, the case of *Al Shams Global BVI Ltd* v *Equity Properties (Pvt) Ltd* 2013 (2) ZLR 131 (H) has in fact been able to point to the rules to elucidate why an opposed matter for provisional sentence in fact should not be on the unopposed roll at all. In that case Justice ZHOU zeroed in on r 223 (1) (a) as clearly providing for the setting down of uncontested cases for provisional sentence on the roll of unopposed matters. In essence, the provision sets out the kind of matters which may be set down on notice on the unopposed roll as follows:

> ***"223. Set down of other matters on notice***
> (1) Subject to subrule (5)—
> (*a*) uncontested cases for provisional sentence; and
> (*b*) summonses for civil imprisonment; and
> (*c*) uncontested actions for restitution of conjugal rights, divorce, judicial separation or nullity of marriage; and
> (*d*) cases set down for judgment in terms of subrule (2) of rule 58 or subrule (1) of rule 59;
> (*e*) applications in which a notice of opposition and opposing affidavit have not been filed;
> may be set down for hearing—
> (i) in Harare, on any Wednesday, by filing a notice of set-down with the registrar not later than the Thursday preceding the Wednesday of set down;
> (ii) in Bulawayo, on any Friday, by filing a notice of set-down with the registrar not later than the Tuesday preceding the Friday of set down."

From the above list of what the rules provide for as being the legitimate matters for the unopposed roll, Justice ZHOU's conclusion is that there is no provision in the rules for contested cases for provisional sentence to be set down on the unopposed roll. This is

correct. He further emphasised that in terms of r 25(2) on provisional sentence, it is Order 32 which deals with application procedure which is mandated to apply *mutatis mutandis* to any notice of opposition to provisional sentence as well as any answering affidavit, which may be filed by a defendant. In other words, it is this rule which lays down the foundation for such a matter becoming an opposed application. As such, it makes perfect sense where a matter has been removed from the roll because it is opposed for it to then be pursued fully as an opposed application under the applicable rules.

This is the reality that emerges from a reading of the rules. I therefore agree that the plaintiff having become aware that the matter was opposed before the hearing date, adopted the correct procedure in removing it from the unopposed roll and filing the necessary papers for the hearing of the matter on the opposed roll. As also indicated in the *Al Shams* case supra, provisional sentence matters have been heard on the opposed roll as evidenced by the cases of *Mavindidze & Anor* v *Mukonoweshuro* 2010 (1) ZLR 191 (H). It is therefore not an unusual procedure to pursue the matter to finality using the application procedure. In view of the above, the objection raised by the defendants that the wrong procedure was adopted lacks merit. Given that there are set rules on when heads of argument are to be exchanged in application proceedings, a party has a liquid document and who does not receive their opponents heads of arguments for several months, has every reason to further conclude that there is no real basis for opposing the claim. Having been made aware that the matter had been set down on the opposed roll as way back as July 2016, the defendant's counsel simply failed to observe the rules of court as regards the filing of their heads of argument. They have no valid reason for the late filing of heads and accordingly remain barred.

The plaintiffs as applicants pointed out in their heads of argument which Ms *Ngongoni* stood by, that Bertha Muzanhenhamo did not file any opposing papers and is accordingly barred and that the matter now centres on the first defendant only. They also raised the point that the only available defence to the defendant is to deny or confirm the signature on the acknowledgment of debt and that this they had failed to do. The fact that the deponent did not author the letter is said to be immaterial as the letter was authored by the director of Muneva Spar. The letter, containing as it did a promise to pay is said to constitute a liquid document. Reliance was paced on the case of CSD *Enterprises (Pvt) Ltd* v *S & T Import and Export (Pvt) Ltd & Ors* 1980 ZLR 238 and *Oostlike Transvaal Ko-Operasie Bpk* v *Kruger* 1958 (2) SA 329 (1).

As such, it is emphasised that the defendants have no defence to the claim for provisional sentence particularly as the same director who signed the Trade Credit Agreement is the one who authored and signed the acknowledgement of debt. Despite an undertaking to pay, no amount has been paid. The plaintiff also pointed out that the defendants can still defend the matter since provisional sentence is not a final order. The opposition to the quest for provisional sentence is argued to be a clear abuse of court process, justifying punitive costs.

I am satisfied that the plaintiffs have a liquid document constituting a clear and unequivocal promise to pay. As stated in *Sibanda* v *Mushapaidze* 2010 (1) 216, any letter, to the extent that it is clear, unequivocal and unambiguous and contains an acknowledgement of debt, can constitute a liquid document for the purposes of the rules on provisional sentence. Furthermore, in accordance with the r 28 of the High Court Rules, a defendant may within one month after attachment or where the judgment has been satisfied without an attachment cause within that one month an appearance to defend to be entered with the registrar to defend the action. The judgment will be become final if he fails to do so. (See *Air Zambezi (Pvt) Ltd & Anor* v *OAFC Aviation Eighteen Limited & Ors* 2014 ZLR (1) 666.

Accordingly, the defendant's point *in limine* is dismissed and an order for provisional sentence in favour of the plaintiff is granted as follows:

1. Judgment for provisional sentence in the sum of USD422 262.28 be and is hereby granted against the 1st and 2nd Defendants jointly and severally, the one paying the other to be absolved.
2. 1st and 2nd Defendants shall jointly and severally, the one paying the other to be absolved, pay interest on USD422 262.28 at the agreed rate of 5 % per month in terms of clause 3 e. of the Credit Facilities Agreement and Clause 2 c. of the Account Standard Terms and Conditions, from the date of issue of summons to date of payment of the amount in full.
3. 1st and 2nd Defendants shall jointly and severally, the one paying the other to be absolved pay collection commission and charges, plus disbursements costs in the sum not exceeding USD8 200.00 in terms of the Credit Facilities Agreement and the Account Standard Terms and Conditions thereto.
4. 1st and 2nd Defendants shall jointly and severally, the one paying the others to be absolved pay costs on a legal practitioner and client scale as agreed in terms of the provisions of the Trade Credit Facility Agreement.

Muhonde Attorneys, applicant's legal practitioners
Tendai Biti Law, respondents' legal practitioners