

STANDARD CHARTERED BANK ZIMBABWE LTD
versus
KUBUDIRIRA MARKETING (PVT) LTD
and
ALEXANDER MARUNI
and
PATIENCE MARUNI

HIGH COURT OF HARARE
MAKONI J
HARARE, 10 November 2016 and 26 July 2017

Opposed Matter

Ms. *E Drury*, for the plaintiff
L Uriri, for the defendants

MAKONI J: This is an application for provisional sentence. The plaintiff issued summons for provisional sentence against the defendant for \$352 191.82 together with interest at the rate of 26 per cent per annum from the 1st of April 2014 to date of full payment. Such claim is based on a notarial general covering bond, a deed of hypothecation over immovable property and a personal guarantee all being securities for the banking facilities extended to the first defendant.

The defendant opposed the granting of the relief sought on the following grounds;

- 1) In *limine*, that the summons for provisional sentence issued by the plaintiff was fatally defective for want of compliance with Order 4 r 21 of the High Court Rules, 1971.
- 2) There is no liquid document upon which provisional sentence can be entered.
- 3) The renunciation of legal exceptions does not render liquid and otherwise illiquid document.

According to Hebstain and Van Winsen, *Civil Practice of the Superior Courts in South Africa* 3rd ed p302;

“Provisional sentence is an alternative procedure available to a creditor who wishes to enforce a claim sounding in money which is in most cases evidenced by a liquid claim. A liquid claim is a document signed by the debtor or agent on the face of which appears that the debtor owes the creditor a fixed amount of money.”

The procedure for obtaining provisional sentence is governed by Order 4 r 20 of the High Court Rules which provides;

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

Such provisional sentence is only available to a plaintiff who is in possession of a liquid document. In *Twee Jonge Gezellen (Pvt) Ltd and Anor v Land and Agricultural Development bank of South Africa and Anor* (2011) ZACC 2 the court described a liquid document as liquid “if it demonstrates, by its terms, an unconditional acknowledgement of indebtedness in a fixed or ascertainable amount of money due to the plaintiff.”

I will deal with the point *in limine* first.

The defendant raised a point *in limine* that, the summons for provisional sentence issued by the plaintiff is fatally defective for want of compliance with r 21. The defendant avers that the summons issued by the plaintiff do not state the amount that is being claimed and the interest due by virtue of a liquid document. The summons give a total amount of USD\$352 191.82 without differentiating between capital and interest.

Mrs *Drury*, submitted that the summons complies with r 21 in that the plaintiff attached a Certificate of Indebtedness which sets out the capital amount together with the interest charged to arrive at the amount claimed.

In *Barclays Bank of Botswana v Mokopotsa t/a Boikhutso Small General Dealer* 2002 (1) BLR 419 (HC) KIRBY J stated that;

“Practitioners also had to be reminded of the strictures of the *in duplum* rule which applied in our jurisdiction. It was unlawful to recover interest in a judgment equal to more than the capital sum upon which interest had accrued. Thus where sums were claimed for monies lent and advanced, as in the present case, the capital component and the interest component had to be clearly distinguished so that the rule could be properly applied.”

Order 4 r 21 of the rules of this court clearly stipulates that;

“A summons claiming provisional sentence shall state the amount **and** any interest due by virtue of the said liquid document or other such demand as by virtue of the said liquid document is legally claimable, and shall call upon the defendant to satisfy the plaintiff’s claim, or in default to appear before the court at the hour and on the day and at the place stated in the summons to show why he has not done so, and to acknowledge or deny the signature to the said liquid document or the validity of the said claim.” (My own underlining).

The rule is couched in peremptory terms. It places an obligation on the plaintiff to state what the capital sum is and what the interest is. The phrase "...amount **and** interest..." undoubtedly shows that the 'amount' element must be stated separately. *In casu*, the plaintiff's summons for provisional sentence does not distinguish between capital component and the interest component. The capital component and the interest component have been combined together giving a total of \$352 191.82. As correctly submitted by the defendant, the plaintiff's claim suffers from a fatal defect in that r 21 which is peremptory has not been complied with.

The rationale behind the need to distinguish between the capital component and interest component can be discerned from the essence of the procedure for provisional sentence as defined by Hebstain and Van Winsen *supra* at 1313 where the learned authors state;

"The essence of the procedure then and now is that it provides a creditor who is armed with sufficient documentary proof (a liquid document) with speedy for the recovery of money due without his having resort to the more expensive, cumbersome amend often dilatory machinery of an illiquid action. The procedural method of provisional sentence is no magic wand to be used to disarm prospective defendants or dispel all opposition, but is a well-recognised, long-standing and often used mode of obtaining speedy relief where the plaintiff is armed with a liquid document. The purpose for provisional sentence proceedings is thus to enable the plaintiff to obtain and enforceable provisional judgment speedily without having to wait for the final determination of the dispute between the parties"

The procedure for provisional sentence is akin to the summary judgment procedure which has been described as a drastic remedy in a number of cases. In view of that, the grounds for the defendant's liability must be clear on the face of the summons and not in documents attached to it as is being suggested by the defendant. This will assist to expedite the matter in that the amount owed will not be open to debate and it will prevent sums being claimed such as interest which flouts in the *in duplum* rule or costs. See *Barclays Bank of Botswana supra*.

Having been satisfied that the summons is not in accordance with the peremptory terms of r 20, it will not be necessary for me to deal with the merits of the matter.

I will therefore make the following order.

- 1) The claim for provisional sentence is dismissed.
- 2) The case be and is hereby ordered to stand over for trial.
- 3) The plaintiff to pay the defendants costs.

Honey and Blankenberg, plaintiff's legal practitioners.
Tandiri Law Chambers, defendant's legal practitioners.