

ZIMBABWE BANKING CORPORATION LIMITED
versus
INTERFIN MERCHANT BANK OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 15 December 2004, 5 January and 9 February 2005

Unopposed Application

Mr *M. Mahlangu*, for plaintiff
Mrs *J. Zindi*, for defendant

MAKARAU J: This is a provisional sentence matter.

On 9 November 2004, the plaintiff issued provisional sentence summons against the defendant, claiming provisional sentence in an amount of \$720 428 163.97 (Seven Hundred and Twenty Million Four Hundred and Twenty- Eight Thousand One Hundred and Sixty Three Dollars and Ninety Seven Cents), together with interest thereon at the prescribed rate from 5 April 2004, being the date of demand to date of payment in full.

The plaintiff's claim is the cumulative maturity values of five bankers acceptances, issued by the defendant in favour of Trojan Nickel Mine and Human People to People and in respect of which the plaintiff is the holder in due course. Copies of the five bills of exchange were attached to the summons.

Summons were duly served upon the defendant on 11 November 2004 and the matter was set down before me for 15 December 2004. Prior to the set down date, the defendant filed an appearance to defend on 15 November 2004 followed by a notice of opposition and an opposing affidavit on 24 November 2004. Such was the consternation generated by the service of provisional sentence summons on the defendant that it filed an appearance to defend and a notice of opposition in the same suit.

In the opposing affidavit, the defendant denied being indebted to the plaintiff as alleged and averred that it had liquidated the indebtedness giving rise to the bills of exchange in the possession of the plaintiff.

When the matter was called up in court, Mrs *Zindi* appeared for the defendant and the matter became heavily contested hence the further postponement of the matter to 5 January 2005 to avoid delaying the remaining unopposed matters on that day's roll.

On 5 January 2005, Mr *Mahlangu* moved for the granting of provisional sentence in favour of the plaintiff. His argument was to the effect that the procedure of obtaining provisional sentence is *sui generis* and where the liquid document upon which the claim is based is not denied, provisional sentence must be granted.

In opposition, Mrs *Zindi* mounted a three pronged attack against the granting of provisional sentence in the matter. Firstly, she submitted that since provisional sentence is an extra-ordinary remedy that seeks to oblige the defendant to pay off the debt in advance of the determination of the claim after a fully fledged trial, the onus on the plaintiff is great and he or she must strictly abide by the provisions of the rules of this court in terms of the particularity of the information to be pleaded. She then proceeded to allege what she conceived as irregularities appearing *ex facie* the provisional sentence summons, which alleged irregularities I shall deal with in detail shortly. Secondly, she objected to my determining the matter outside the ambit of opposed applications and urged me to refer the matter to the opposed roll. Finally, she advanced the argument raised in the opposing affidavit that the debt secured by the bills of exchange had since been discharged and accordingly, the plaintiff was not entitled to provisional sentence on such bills.

I now turn to deal with each of the arguments advanced by Mrs *Zindi*. Before I deal with the first argument, it is in my view necessary to recap on the essential elements of the procedure of provisional sentence. It has struck me that litigants before this court infrequently resort to the procedure of provisional sentence presumably following the relaxation of the rules relating to when one may apply for summary judgement, which is a final judgement as opposed to provisional sentence. My further experience has been that where the procedure of provisional sentence is invoked, invariably, there is no opposition to the granting of the provisional sentence, which is then routinely done in terms of the summons. The position as to what happens when opposition to provisional sentence is manifested in the form of opposing affidavits or the defendant appearing on

the floor of the court has thus become blurred through the disuse of the procedure. It is therefore in my view necessary to recall that the procedure of provisional sentence allows a creditor armed with a liquid document, to obtain payment of the debt without having to wait for the final determination of the dispute between the parties. Whilst a speedy remedy, provisional sentence is an extra-ordinary remedy based on the presumption of indebtedness created by the liquid document. It is a brisk and robust remedy granted by the court in appropriate cases, on the date of the hearing endorsed on the face of the summons, after the court has satisfied itself that the defendant has no probability of success in the principal case. Although opposed, the matter cannot wait to be determined on the opposed roll in accordance with the provisions of Order 32 of the High Court rules 1971, although the filing of further affidavits in the matter after the opposing affidavit are to be in terms of the provisions of Order 32.

The above is my view in answer to the second argument raised by Mrs *Zindi* that the matter be referred to the opposed roll. 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.

I now return to the first argument advanced by Mrs *Zindi*. In this regard, she raises defects allegedly appearing ex facie the provisional sentence summons. In detail, she argued that the plaintiff had neither alleged a cause of action in its summons nor that it had made demand when the bills matured and the amount of their value became due and payable. She further argued that the plaintiff has not alleged on its summons when it became the holder in due course of the bills of exchange it seeks provisional sentence on.

On the basis of these shortcomings, she urged me not to grant provisional sentence in the matter.

While it is true that in provisional sentence proceedings, the plaintiff ought in principle to have his or her papers in order, it has been the approach of the courts in South Africa not to be deterred from granting provisional sentences by technical defects on the face of the summons that can be cured by suitable amendments.¹ In the *Barclays National Bank* case, MARGO J opines that “one incidental omission- even more than one incidental omission- may perhaps, in a proper case, be fairly cured by amendment”(to the summons). In that case, he refused an amendment to the provisional sentence summons because the omissions were not only numerous but in his view, rendered the provisional sentence summons an abortive process.

I find merit in the approach by the South African courts in the cases cited above. Although my limited research has not yielded a local case where this approach was specifically adopted, I do not doubt that our courts would follow the South African approach rather than putting the provisional sentence summons under a microscope before granting the relief sought. The general approach of this court to amendment of pleadings has always been to grant such where in doing so no injustice or prejudice that cannot be cured by an award of costs is occasioned the other party. No reason suggests itself to me that this approach should not be followed in provisional sentence matters, notwithstanding that provisional is an extraordinary remedy.

I have carefully considered the alleged defects pointed out by Mrs *Zindi*. Firstly, the plaintiff does allege a cause of action by alleging that it is the holder in due course of certain described bills of exchange for which payment has been refused on demand. Secondly, demand is alleged to have been made on 5 April 2004. Even if such demand was not made, this is hardly a defect of such a nature as to vitiate the summons as it is not necessary that demand be made. The provisional summons acts as demand.²

It is my further view that failure to aver when the plaintiff took possession of the bills of exchange does not vitiate the provisional sentence summons. It appears trite to me

¹ Estate Reynolds v Dorasamy 1950 (4) SA 33 (D); Jenkins v de Jaager 1993 (4) SA 534 (N) and Barclays National Bank v Swartzberg and Others 1974 (1) SA (WLD) at 133.

² Jammine and Another v Emil 1951 (4) SA460 (TPD).

that a bill remains negotiable until its discharge. The issue to determine is whether the defendant has raised a probability of success in the main action to prove that it is no longer liable on the bills for the reasons it advances.

It is common cause that the bills became due for payment on 29 December 2003. Presentation for payment was allegedly made in April 2004 and no payment was effected. The defendant alleges that it had effected payment in December 2003 to First Mutual Asset Management Company, who had invested some money with the defendant and as security for which the bankers' acceptances were issued. Defendant alleges that after paying off the amount of the debt, it did not retrieve the securities. I may mention in passing at this stage that the link between First Mutual Asset Management Company and the bills attached to the summons before me has not been explained. This link or lack of it, is however not of such relevancy as to deter me from determining this matter.

It appears to me that the law is well settled that the onus rests with the defendant in provisional sentence matters to show that he or she has probabilities of success in the main action. Such probabilities must be substantial and should not be mere conjecture. The probabilities must be based on facts laid out in the affidavit and not upon inferences to be drawn from the facts.³

In *casu*, it is my view that the defendant has failed to raise such probabilities. Firstly, assuming that First Mutual Asset Management Company presented the bills for payment, they must have delivered the bills to the plaintiff upon receiving payment for such to constitute a discharge of the bill. Clearly this was not done and the alleged payment to First Mutual Asset Management Company did not discharge the bill. Payment on a bill to constitute a discharge of the bill must be to the holder. The defendant has not raised any probability that the plaintiff was not the holder of the bills when it allegedly made payment to First Mutual Asset Management Company.

Secondly, and more importantly in my view, the plaintiff is a holder in due course of the bills and holds these free of equities. The defences that the defendant may have against First Mutual Asset Management Company are not good against the plaintiff.⁴ It is

³ Hicks v Dobriskey 1976 (10 ZLR 218.

⁴ Malan : Bills of Exchange, Cheques and Promissory Notes 2nd Ed p 11.

my view that the alleged defence raised by the defendant that it made payment on the bills is not valid against the plaintiff as holder of the bills.

In the result, it is ordered that provisional sentence be entered for the plaintiff in the sum of \$720 428 163-97 together with interest thereon at the rate of 30 % p.a. from 5 April 2004 to date of payment in full.

Gill Godlonton & Gerrans, plaintiff's legal practitioners

Kantor & Immerman, defendant's legal practitioners