

EASTRING INVESTMENTS (PVT) LTD
versus
DEFURB INVESTMENTS (PVT) LTD
and
SILENCE ZIMOWA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 30 November 2016 & 28 December 2016

Motion

B Diza, for the plaintiff
Ms C Shoniwa, for the defendant

MATANDA-MOYO J: The plaintiff issued summons for provisional sentence in the sum of \$10 699-49 against the defendants jointly and severally, the one paying the other to be absolved. The claim is based on an acknowledgment of debt executed on 7 July 2016 by the first defendant. The second defendant acted as surety and co-principal debtor. In terms of the said acknowledgement of debt, the settlement was to be made on or before 1 August 2016. In breach of the said acknowledgment of debt the defendants have failed to settle the amount.

In that acknowledgement the defendants admitted being indebted to the plaintiff in the sum of \$10 699-45 for outstanding rates and electricity charges in respect of number 16 Kaguvi Street Harare.

The defendants opposed the order sought on the following basis that;

1. The second defendant was wrongfully joined to the proceedings.
2. The plaintiff has no right to claim amounts not owing to itself but to ZESA and Harare City Council. The acknowledgement of debt was only signed on condition the plaintiff renewed the lease agreement. The plaintiff has breached the terms of the agreement by cancelling the said lease.

3. The first defendant alleged to have made certain improvements to the property to the sum of \$70 000-00. These amounts could be set off against the \$10 699-45.
4. The plaintiff has instituted other proceedings claiming arrear rentals against the defendants. It is only fair to have all matters consolidated and heard at the same time.
5. The plaintiff is holding onto \$9 000-00 paid as deposit and \$3 000-00 goodwill. Thus defendant owes the plaintiff \$12 000-00 in deposit money which should be set off against the plaintiff's claim.

Rule 20 of this court's rules allows a plaintiff who is a holder of a valid acknowledgement in writing of a debt to claim provisional sentence on that document. Provisional sentence is a special procedure designed to give a plaintiff who is a holder of a liquid document and *prima facie* proof of his claim speedy judgment without the expense and delay that ordinary trial action entails.

The first issue is to determine whether indeed the plaintiff is a holder of a liquid document. A liquid document has been defined in the case of *Rich and Others v Lagerway* 1974 (4) SA 748 (A) as follows;

“If the document in question, upon a proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto, is a conditional acknowledgement of indebtedness in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted.”

Herein the defendant admits signing the acknowledgment of debt. They also accept owing \$10 699-49. No further evidence is required to prove that debt. The requirements for granting a provisional sentence have been met. The defendant however filed opposing affidavits. Firstly, second defendant challenges his inclusion as a defendant. He admitted the amount is owed by the first defendant. He only signed the acknowledgement of debt as the officer of the first defendant and not in his personal capacity. I have perused the acknowledgment of debt. Under particulars of debtor it is written:

“I, Silence Zimowa, ID No. 63-1130350-Z-47 representing Defurb Investments (Pvt) Ltd (herein after called the debtor).”

It is correct that the second defendant signed in a representative capacity. It is trite that although the first defendant enjoys a legal person status, it can only act through its officials.

However such acting by officials do not render them liable for the actions of the first defendant except as provided for by the law. There is therefore no basis in law for suing the second defendant.

The first defendant argued that the debt belongs to utility providers and the plaintiff has no standing to sue for debts not belonging to it. This argument lacks merit as it is common cause the plaintiff owns the premises where such utility bills remain owing. As the owner of the premises, the plaintiff is liable for payment of such bills to the utility companies. As such the plaintiff is entitled at law to recover such amounts from the first defendant.

The other defences relate to set off. The only defences allowed in terms of r 21 against a claim for provisional sentence are such defences pertaining and to the liquid document and on explanation why the amount has not been settled. The defendant is allowed to challenge the liquid document itself. Rule 21 provides;

“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 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 defendant’s appearance on the set down day is limited to simply show why he has not satisfied the plaintiff’s claim and to acknowledge or deny the signature to the acknowledgement of debt. The defendant can also challenge the validity of the claim.

Whilst provisional sentence offers creditor a speedy remedy for the recovery of money without resorting to cumbersome trial proceedings, it should be bone in mind that such proceedings do not result in the end of the matter. The defendant after satisfying the provisional sentence is free to defend the matter.

Herein the defendant proffered an explanation that although he owes the amount, he has not paid because the plaintiff is holding a deposit of \$9 000-00 which amount the plaintiff can utilise in paying off the bills. That explanation is reasonable. However there will still be a sum of \$1 699-49 owing. There has been no satisfactory explanation with regards the balance. The defendant tried to explain that he intends to sue for payment of repairs he carried out on the plaintiff’s property. He has not instituted such claims and there is no proof of such claims. The

only set off that can be allowed is for another liquid claim. A claim for repairs is illiquid and will require determination by a court.

For purposes of provisional sentence I am satisfied that the \$9 000-00 held as deposit can be channeled towards the claim for \$10 699-49. Since there has been no acceptable challenge on the validity of the acknowledgement of debt, I am satisfied at this stage that the plaintiff is entitled to the balance remaining of \$1 699-49.

In the result, I order as follows;

1. That the defendant pays to the plaintiff the sum of \$41 699-49 together with interest at the prescribed rate from the date of judgement of date of payment in full.
2. That the defendant pays costs of suit.

Mhishi Legal Practice, plaintiff' legal practitioners
IEG Musimbe & Partners, respondents' legal practitioners