

ENGEN OIL ZIMBABWE (PVT) LTD
versus
DOWOOD SERVICES (PVT) LTD
(Formerly trading as Bradfield Service Station)

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 29 April and 20 May 2015

Unopposed Application

R Stewart, for the plaintiff
B Ngwenya, for the defendant

MATANDA-MOYO J: Plaintiff issued summons for provisional sentence against the defendant for \$34 476-00 together with interest at the rate of 18 per cent per annum from 30 June 2014 to date of full payment. Such claim is based on an acknowledgment of debt signed by the defendant on 10 June 2013. Whilst acknowledging the debt the defendant opposed the granting of the relief sought on three grounds;

- 1) That the summons were issued prematurely in violation of the agreement between the parties in particular Article 22 of the agreement requiring a meeting be held between the parties first.
- 2) That the amount appearing on the acknowledgement of debt is not correct as it fails to recognise payments made by the defendant; and
- 3) That such acknowledgment of debt was signed under duress. The plaintiff threatened to stop supplying the defendant with the products if defendant had failed to sign such acknowledgment of debt.

The procedure for obtaining provisional sentence is governed by Order 4 of the High Court Rules. Such rule is merely procedural and has not altered the principles of our common law. Such provisional sentence is only available to a plaintiff who is in possession of a liquid document. In the case of *Twee Jonge Gezellen (Pvt) Ltd and Anor v Land and Agricultural Development bank of South Africa and Anor* (2011) ZACC 2 a liquid document was described 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.” See also *Sibanda v Mshapaidze* HC 2961/09.

An acknowledgment of debt has been recognised as one such document. A liquid document gives rise to a rebuttable presumption that the defendant is indeed indebted to the plaintiff in the amount stated in the document.

In the matter in *casu*, the plaintiff has managed to produce an acknowledgment of debt signed by the defendant. The defendant accepts the genuineness of the acknowledgement of debt but raises the above three defences.

Provisional sentence is not a final order. The defendant is still permitted to defend the matter after satisfying the debt – see r 28 of the High Court Rules. The defendant can still defend the matter after the granting of provisional sentence. It is simply a procedure to allow a creditor in possession of a liquid document to immediately recover its debt.

Let me now proceed to consider defendant’s defences.

1. That summons were issued prematurely

The defendant relied on Article 22 of a Marketing Licencing Agreement it entered into with the plaintiff on 14 January 2012. That is the agreement providing for parties to try and resolve any dispute arising amicably before taking matter to court. The defendant submitted that no such meeting took place. However the plaintiff argued that the acknowledgment of debt was reached as a way of amicably settling the dispute. Such acknowledgment of debt was signed on 10 June 2013. The respondent in such document undertook to settle the whole amount of \$34 476-00 on or before 30 June 2014. Respondent also undertook to pay interest at the rate of 18 per cent in the event of default.

I am of the view that the acknowledgment of debt was signed pursuant to Article 22 of the agreement. The parties had attempted to resolve dispute amicably before approaching court. I am thus of the view that the argument that summons were issued prematurely is not supported by facts.

2. That the amount appearing on the acknowledgment of debt is incorrect:

The defendant submitted that it had been making payments towards extinguishing the debt, which payments were made after the signing of the acknowledgment of debt. In support of this submission the defendant attached an e-mail written on behalf of the defendant to plaintiff dated 22 February 2012. The e-mail stated;

“Please note in the rentals sheet there are 3 transactions not recorded or posted on and amounts to \$6 800-00 (Jan – Oct 2011)”

The above query was raised before the signing of the acknowledgement of debt. The acknowledgement of debt was signed on 10 June 2013, and the query had been raised in February 2012. The reasonable presumption to be drawn from the dates is that as at 10 June 2013 the query had been resolved. This defence lacks factual backing. There is no evidence that the defendant made any payments after the signing of the acknowledgment of debt.

3. That such acknowledgment of debt was signed under duress

The defendant submitted that the acknowledgment of debt was only signed after threats by plaintiff to cut supplies to the defendant. The defendant claimed it only signed the acknowledgment of debt as a way of ensuring continued supply of the product from the plaintiff.

Duress can be defined as unlawful pressure exerted upon a person to coerce that person to perform an act that he or she ordinarily would not perform. Was there any unlawful pressure exerted on the defendant to sign the acknowledgment of debt? The answer is definitely in the negative. It was within the lawful means of the plaintiff to stop supplying the product to the defendant before payment. Such a term is not unlawful. It is an acceptable business practice to stop supplies to a customer owing much money to protect a supplier from accumulating bad debts. I am therefore of the view that the submission by the defendant fails to qualify as duress. There is no evidence that the defendant was unlawfully forced to sign the acknowledgement of debt.

In conclusion I am of the view that the plaintiff has satisfied the requirements for the granting of the provisional sentence.

Accordingly it is ordered that;

1. The defendant shall pay the sum of \$34 476-00 (thirty four thousand four hundred and seventy-six United States Dollars) together with interest on that amount at the rate of 18 per cent per annum from 30 June 2014 to the date of full and final payment.
2. The defendant shall pay costs of suit on a legal practitioner and client scale.

Messrs Wintertons, plaintiff's legal practitioners
R Ndlovu & Company, defendant's legal practitioners