ALAN BRIGGS
versus
LAWRENCE BILLIATI
and
MINESACK INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 17 September 2015 and 23 September 2015

Provisional Sentence

The plaintiff in default
D Chikwangwari, for the defendants

MATHONSI J: This is a claim for provisional sentence in the sum of $199 430-00 together with interest at the prescribed rate of 5% per annum from 3 December 2013 to date of payment and costs of suit.

The claim is based on 4 documents which are extremely confusing and seriously lack clarity. The first is a copy of a document with the heading "Money Powel By Lawrence Billiati" It contains a list of 6 figures adding up to $81 779-00 as money paid and records a "balance owing" of $199 430-00. In concludes by saying:

> "I Alan Briggs have received the above mentioned amount in cash from Laurence Billiati for the loan repayment given to Mine Sack"

It is signed allegedly by Alan Briggs and Lawrence Billiati on 10 October 2013 which signing was not witnessed. That document does not state when the loan was allegedly advanced, when the amounts allegedly paid were so paid and why the first defendant would assume personal liability if the loan was advanced to the second defendant.

The second document bears the heading "Investment made by Flaksent to Mine Sack Investments" It goes on to say:

"I Alan Briggs sold a new blue Vigo to Mine Sack Investments represented by Lawrence Billiati for the sum of $50 000 USD and to be paid over a period of six calendar months.
Blue Vigo was given in late July 2011.

Vehicle cost	$50 000 USD
Payments made to date	$10 610 USD
Balance Owing	$39 390 USD

Payments have been made in USD and monies have been given directly to me"

It is signed allegedly on behalf of Flaksent Investments and Mine Sack Investments on 3 December 2012 and the signing was not witnessed by anyone.

If that document relates to an "Investment" made by Flaksent to Mine Sack Investments one wonders what it has to do with the sale of a motor vehicle. More importantly, if the investment or sale was done by Flaksent to Mine Sack Investments, on what basis in law is the plaintiff suing for it and the first defendant being sued on it for a debt which would be owed by a company?

The third document has no heading and is as meaningless at it is confusing. It simply reads:

"I Lawrence Billiati from Mine Sack Mining will pay $12 000 USD every month to Alan Briggs for loan repayment starting from end of October 2013"

It is signed allegedly by the plaintiff and the first defendant on 10 October 2013.

The final document reads:

"INVESTMENT AGREEMENTS BETWEEN ALL PARTIES TO MINE SACK INVESTMENTS FOR THE YEAR OF 2012

I Alan Briggs of Flaksent Investments state that I acknowledge receiving funds from third parties for the investments into a mining venture with Mine Sack Investments in Kadoma and declare that all information I have stated and given is true and all due monies and interest will be paid in full by December of 2013.

FLACKSENT INVESTMENTS (SIGNED)
06/05/2013

I LAWRENCE Billiati of Mine Sack Investments state that I acknowledge receiving funds from Flaksent Investments for the development of my mine and that I declare that all information given is true and Mine Sack Investments declares all monies and interest due will be paid in full by Dec 2013.

MINESACK INVESTMENTS Signed…….

THIRD PARTY Signed……..”

The third parties that invested the money are not named. The amount they advanced is not specified. The document does not state that whatever amount it is that was invested would have to be paid to the plaintiff. It does not state that the first defendant would be personally liable for the repayment of money invested in a company. Clearly that document does not meet the requirements of a liquid document which can found a claim for provisional sentence.

Looking at the totality of all the documents upon which the claim for $199 430-00 is based there is nowhere whatsoever that the first and the second defendants acknowledge indebtedness to the plaintiff in that amount. Quite strangely on the first document it is the plaintiff who acknowledges receiving monies and not the defendants acknowledging indebtedness. On the second document, again it is the plaintiff who acknowledges selling a vehicle although it is headed as an investment. On the third document the first defendant allegedly acknowledges that he will pay a sum of $12 000-00 for an unknown amount, while the fourth document contains no figure at all apart from the fact that whatever amount it represents, it is not owed to the plaintiff but unknown third parties.

Significantly even if one were to assume generously in favour of the plaintiff that the two defendants acknowledged indebtedness of the stated figures, an assumption which cannot be lawfully made in the circumstances, the figures stated do not tally.

The defendant has denied any indebtedness to the plaintiff in the amount claimed or at all. They deny that the first defendant’s signature is appended on the documents relied upon which they claim are fake. They have challenged the plaintiff to produce the originals which he has not done.

In terms of r 20 of the High Court of Zimbabwe Rules, 1971:

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

Provisional sentence allows the plaintiff to receive payment before the defendant has defended the suit at trial and may therefore be said to be an extra ordinary remedy. A court

granting provisional sentence must therefore be satisfied of the validity of the acknowledgment of debt, to the extent that the defendant did in fact append his signature on it to unequivocally acknowledge owing a specified sum of money. It would be a travesty of justice were the court to grant provisional sentence on the strength of vague, confusing and unclear documents whose authenticity has been questioned.

Where the defendant denied that the signature on a document is his or that of his agent, the onus is on the plaintiff to establish that indeed it is his: *Donkin* v *Chiadzwa 1*987 (1) ZLR 102 (H) 103G. See also Hebstein and van Winsen, *Civil Practice of the Superior Courts in South Africa*, 3rd ed at pp 555 – 556.

In the words of Makarau JP (as she then was) in *Sibanda* v *Mushapaidze* 2010 (1) ZLR 216 (H) 218 E – F;

> "The term liquid document is not defined in the rules. This court has however held that any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document. Thus, any letter, to the extent that it is clear, unequivocal and unambiguous and contains an acknowledgment of debt, can constitute a liquid document for the purposes of the rules on provisional sentence."

I have already expressed the difficulties posed by the documents relied upon by the plaintiff in this matter which clearly disqualify them as clear, unequivocal and unambiguous written promises to pay a debt as evinced by the rules and therefore they cannot found a claim for provisional sentence.

The position of the plaintiff is made worse by the fact that the defendants have disowned the signatures attributed to them on those documents. The plaintiff, who bears the onus, has not discharged it to prove that indeed the defendants signed the documents. The determination of that issue cannot be made at provisional sentence stage but would have to be reserved for trial. Whichever way, the plaintiff cannot succeed at this stage. As stated by Price J in *Allied Holdings Ltd* v *Myerson* 1948(2) SA 961(W) at 968 (quoted with approval in *Sibanda* v *Mushapaidze*, *supra*):

> "It is recognized, of course that a liquid document which on the face of it speaks unequivocally, must have the story of the transaction behind it and that an investigation into that story may show that the (defendant) is not liable in terms of the liquid document; but once we go behind the liquid document the onus is on the defendant to show that if evidence were heard the probabilities are that he would succeed."

For now the matter is resolved. I would have refused provisional sentence and stood the matter down for trial in terms of r 34 but then the plaintiff did not appear to prosecute the matter. The notice of set down was served upon the plaintiff's legal practitioners on 17 August 2015 but they chose not to appear.

The summons is therefore ripe for dismissal.

Accordingly, the provisional sentence summons is hereby dismissed with costs.

C Chinyama & Partners, plaintiff's legal practitioners
Messrs Jarvis Palframan, defendant's legal practitioners