PRISCILLA FUSIRE
versus
EMMANUEL CHIROTO

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 10 November 2015 and 8 January 2016

Opposed Application

B Mataruka, for the applicant
T Zhuwarara, for the respondent

CHIGUMBA J: Plaintiff issued a provisional sentence summons against the defendant on 13 February 2015 claiming an amount of USD$28 000-00 together with interest thereon at the prescribed rate calculated from 5 March 2014 to the date of payment in full, as well as costs of suit. The plaintiff's claim was based on an acknowledgement of debt executed in her favor by the defendant. The issues that arise for determination in this matter are whether the plaintiff has fulfilled the requirements provided for a claim for provisional sentence in terms of order 4 rr 20 and 21 of the rules of this court, or whether the defendant has adduced sufficient cogent evidence that the acknowledgment of debt was signed under duress and is not valid. In other words is the plaintiff nothing more that a woman scorned who is bent on exacting revenge for defendant's breach of promise to marry her, or is the defendant nothing more than a man who does not stand by his word, who breezes through life making promises to marry, promises to pay, then turns around and callously breaks his promises in the hope of escaping the consequences?

Defendant was to appear before this court on 11 March 2015 to answer the claim. On 3 March 2015 he filed a notice of opposition and in the opposing affidavit, averred that the acknowledgment of debt which the plaintiff sought to rely on was not deposed to freely and voluntarily as it was dictated to him and signed under duress as a result of threats by a police officer who had arrested him and threatened to lock him up unless he signed the agreement. He referred to his defence outline in case CRB 4552/14 where he was charged with the offence of

fraud and the charges against him were dismissed. The basis of the dismissal was that the state failed to produce the acknowledgment of debt as an exhibit. It is common cause that the parties were involved in an intimate relationship between November to January 2012 with the intention of tying the knot. During that period plaintiff contributed towards the household expenses and the needs of the parties' respective businesses, as well as electricity, rent, clothing, hotel accommodation and school fees expenses. Defendant averred that when the relationship ended unceremoniously in January 2012, plaintiff was bitter about the breach of promise to marry her and threatened to embarrass him in public.

Subsequently, defendant was summoned to the commercial crimes unit to answer allegations of theft of trust property in mid 2013. He acknowledged his indebtedness to the plaintiff and provided a payment plan, out of fear of being detained in police cells and of being embarrassed in public. In February 2014, defendant was again summoned to the serious fraud squad and threatened with detention and public embarrassment. A warned and cautioned statement was recorded and signed. On or about February-March 2014 he signed the acknowledgment of debt and deposed to it in the presence of a police officer. He reluctantly paid USD$1 000-00 in cash to the police officer for onward transmission to the plaintiff. Thereafter he was bombarded with phone calls from the police in which they demanded further payments, which only stopped after he threatened to report them for extortion. Defendant denied that plaintiff ever gave him any money.

The matter was referred to the opposed roll. On 2 June 2015, plaintiff filed an answering affidavit in which she denied that the defendant had a valid defence to her claim. She reiterated that the acknowledgment of debt was signed freely and voluntarily by the defendant. She challenged defendant to explain why he never reported the alleged extortion, threats or duress to the police. She averred that the failure by the state to produce the affidavit acknowledging indebtedness was due to no fault on her part. Finally, she stated that the acknowledgment of debt does not in any way relate to her contributions to household expenses. In the heads of argument which were filed of record on 2 June 2015, on behalf of the applicant, the court was referred to the case of *African Banking Corporation of Zimbabwe t/a Banc-ABC* v *PWC Motors & Ors*[1] where it was stated that;

[1] HC5743/12

> "… a pattern is manifesting itself where business people will stop at nothing in avoiding to pay legitimate claims and in the process play havoc with investor confidence".

It was submitted further, that the remedy of provisional sentence is provided for in terms of order 4 rr 20 and 21 of the High Court Rules of Zimbabwe 1971, which provides that;-

> ***"20. Summons claiming provisional sentence***
> Where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document.
>
> ***21. Contents of summons for provisional sentence***
> 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.

Applicant contended that she is the holder of a valid acknowledgment of debt, a liquid document and that she is entitled to proceed in terms of rule 20. See *Kudakwashe Mandizvidza & Nyaradzo Mandizvidza* v *Murisi Mukonoweshuro*[2], where this court stated that;-

> "An acknowledgment of debt by one or both parties clearly stipulating the amount owed by the defendant to the plaintiff constitutes a liquid document within the ordinary meaning of rule 20 of the High Court Rules 1971".

She contended further, that her summons fulfils the requirements of r 21. A defendant served with summons for provisional sentence may either satisfy the claim or appear in court to show cause why he has not satisfied the claim, or to acknowledge or deny the signature on the said document or the validity of the signature. Defendant in this case did not deny his signature. He seeks to resile from the document on the basis that when he signed the document he was under duress and fear of being embarrassed and detained. Applicant contends that it is trite that a person who signs a contract signifies his assent to the contents of the document, and that, if the document subsequently turns out not to be to his liking he has no one to blame but himself. See *Burger* v *Central SAR*[3], and *George* v *Fairmead (Pty) Ltd*[4]. In *Book* v *Davidson*[5], emphasis was placed on the sanctity of contracts, as follows;-

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[2] HC 439/10

[3] 1903 TS 571 @ 578 "It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature".

> "There is however another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts…If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider-that you are not lightly to interfere with this freedom of contract…to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country.

So a man's word is his bond after all. Contracts are sacrosanct unless the evidence shows that they were not entered into freely and voluntarily.

> "The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme. The general rule, sometimes known as *caveat subscriptor* rule is therefore that a party to a contract is bound by his signature whether or not he has read or understood the contract'. See *Business Law in Zimbabwe*[6].

Let us examine defendant's allegations of coercion and determine whether they are sufficient, and cogent, to vitiate the acknowledgment of debt and render it void. It is trite that 'the duress that is sufficient to vitiate a contract must not be fanciful or imagined. It must be some real and serious threat'. See *Genesis Venture Private Limited* v *Rolmay Trading Private Limited & Anor*[7]. The defendant has not named the Investigating officer who allegedly threatened him with detention or public exposure if he did not sign the acknowledgment of debt. There is no evidence that the defendant reported the investigating Officer to his superiors or that he even wrote a letter of complaint or sought refuge in the numerous other divisions of the Zimbabwe republic police. In this day of social media and sophisticated technology it is difficult to fathom why the defendant did not at least make an effort to record evidence of telephonic

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[4] 1958 (2) SA 465 (A) @ 472A;- "When a man is asked to put his signature to a document he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature".

[5] 1988 (1) ZLR 368 (S) @ p378-379

[6] R. H Christie, p67, The law of Contract in South Africa 2nd ed, Butterworths

[7] HC 531/08

threats and requests for payment, extortion. He could have easily obtained evidence against the investigation officer if he so wished. Defendant was legally represented at the fraud trial.

No explanation is given as to why he did not instruct his legal practitioner to make an appropriate application to have the acknowledgment of debt set aside by this court on the grounds that it was void ab initio, a product of duress, which vitiated it. To wait until plaintiff institutes these proceedings or until he was charged with fraud, to raise the defence, brings doubt as to the veracity of his claims of intimidation. It does not in my view constitute sufficient evidence of duress to vitiate the acknowledgment of debt. It is valid. In the acknowledgment of debt, the defendant actually expressly denies that he has been subjected to any threats, and happily tells the world that he has signed it freely and voluntarily! Defendant's denial of liability for the sum claimed is not plausible or believable. Defendant has failed to discharge the onus which rested on him to show, in provisional sentence proceedings, that he has probabilities of success in the main action. He has not shown any substantial probabilities. See *Zimbank* v *Interfin Merchant Bank of Zimbabwe Private Limited* [8].

The defendant's heads of argument were not in the least bit instructive. In fact the heads of argument show clearly that the defendant has no valid defence and that there was an abuse of this court's process. Counsel for the defendant, at the hearing of the matter, advised the court that he had nothing meaningful to add, and sat down! To protect its dignity, and to guard against the future abuse of its process, the court will make an appropriate order as to costs as a sign of its displeasure. For these reasons, provisional sentence be and is hereby granted against the defendant in the sum of USD$28 000-00 plus interest thereon at the prescribed rate calculated from 5 March 2015 to the date of payment in full, together with costs of suit on a legal practitioner client scale.

Messrs Gill, Godlonton & Gerrans, applicant's legal practitioners
Messrs F G Gijima & Associates, respondent's legal practitioners

[8] 2005 (1) ZLR 114 (8)