

ZIMBABWE LEAF TOBACCO COMPANY (PVT) LTD
versus
KEVIN CRAEME COOKE

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

Motion

T Zhuwarara, for the applicant
R Stewart, for the respondent

MATANDA-MOYO J: The plaintiff issued summons for provisional sentence for payment of \$851 482-11 together with interest on that amount at the rate of 90% per annum from 6 October 2016 to date of full payment. The plaintiff is a holder of an acknowledgement of debt executed by the defendant on 23 June 2015. The defendant acknowledged owing the plaintiff the sum of \$1 297 048-44 together with interest at 9% per annum. The defendant has to date paid a sum of \$218 556-00 leaving a balance of \$851 482-11.

The defendant opposed the order sought on the basis that the acknowledgment of debt is part of a series of transactions between the parties. The defendant is in breach of the remaining contractual documents. The plaintiff was in terms of the contract supposed to pay the defendant on average of \$4-00 per kg for the 2015/16 season. The plaintiff offered the defendant an average of less than \$3-00 per Kg in violation of its undertaking. Such breach resulted in defendant failing to meet its obligations.

The defendant also challenged the validity of the acknowledgement of debt. He averred that at the time of signing he was informed that the signing of an acknowledgement of debt was a mere formality. The defendant also averred that the terms of the acknowledgment of debt had been novated several times over.

The defendant at the hearing raised a preliminary point that this matter ought to be referred to the opposed roll. This matter could not be heard on the unopposed roll with the defendant having filed a notice of opposition before the set down date. The defendant argued that because he had raised challenges on the issue of the founding documents' liquidity there should be proper and due ventilation of the issues raised through the opposed roll process. He relied on the decision of ZHOU J in *Al Shams Global BVI Ltd v Equity Properties* 2013 (2) ZLR 131. The defendant argued that in terms of the rules of this court in particular Order 4 r 25 the matter ought to have been referred to the opposed roll and not be set down on the unopposed roll.

Counsel for the plaintiff insisted the matter had been set down on the correct roll. He relied on the judgement of MAKARAU J as she then was in *Zimbank v Interfin Merchant Bank of Zimbabwe* 2005 (1) ZLR 114 (H).

In order to resolve the above issue it is important to understand what the remedy of Provisional sentence entails. My understanding of the remedy of provisional sentence is for a plaintiff who is a holder of a liquid document to secure speedy relief. To therefore postpone the remedy if all requirements are met is to deny the plaintiff such quick access to relief. Unlike summary judgement such relief is not final in nature. The defendant is still free to defend the matter, once he has acted in terms of the provisional sentence. Also if the provisional sentence proceedings are not successful, the matter continues on the normal course. The relief is therefore provisional in nature and does not take away the defendant's right to pursue any possible defences to the claim.

Having understood what the remedy entails, the next question to be answered is whether the noting of any opposition to the claim for provisional sentence automatically result in the matter being removed from the roll of unopposed matters to the roll of opposed matters? There is obviously no consensus on the position by this court. One school of thought has found that once a notice of opposition has been filed prior to set down, the matter should not be set down on the unopposed roll. The other believe, the matter can still be heard on the unopposed roll.

Rule 25 deals with notices of opposition and answering affidavits to the claim for provisional sentence. It provides;

“(1) Prior to the date stated in the summons for appearance to answer the plaintiff's claim, the defendant may file a notice of opposition in form No. 29A, together with one or more supporting affidavits.

- (2). Order 32 shall apply, *mutatis mutandis*, to the service of a notice of opposition in terms of r (1) and to the filing and service of any answering affidavits or further affidavits by the parties.”

I do not read the above rule to be providing a hard and fast rule that simply because an opposition has been filed automatically the matter should be referred to the opposed roll. The rule is supposed to be interpreted in the context of an application for a provisional sentence. I am of the opinion that order 32 is interpreted with the necessary changes that would not take away the meaning of provisional sentence. To automatically refer the matter to the opposed roll without the court making a finding that the defendant has, a defence to be canvassed is to undermine or take away the remedy. My understanding is that the court on the date of set down should hear the parties, especially the defendant. If the defendant’s defence is such that the matter can be resolved either way, the court should thereat dispose of the matter. If the defence raised by the defendant requires further filing of papers by the parties the court can either refer the matter to the opposed roll or to trial if the facts are not capable of resolution on papers. This can be done where the defendant produces sufficient proof on affidavit to show that the probability of success in the principal case favours the defendant *see Froman v Robertson* 1971 (1) SA 115 A at 120B. At this stage the court has no inherent discretion to hear oral evidence on issues other than the authenticity of the defendant’s signature on the document. Hebble and Van Winsen *The Civil Procedure of the High Courts and the Supreme Court of Appeals of South Africa* 5th ed vol 2 at 1397:

“In every case therefore if the probabilities favour the defendant provisional sentence will be refused; if they do not favour the defendant provisional sentence will be granted except in special circumstances. The special circumstances that have been recognized by our courts arise when the probabilities of success favour neither the plaintiff nor the defendant and the provisional sentence claim is part of a large transaction which is in dispute between the parties.”

It is my finding therefore that the mere fact that a notice of opposition has been filed should not automatically lead to the matter being referred to the opposed roll.

Having found that, it is the defendant’s submission that the acknowledgement of debt was a part of series of transactions. Without considering the other transactions it would be unjustified to grant the order sought. He explained that the acknowledgement of debt was signed on the understanding that the plaintiff would pay to the defendant a minimum of \$4-00 per kg for the tobacco grown for the plaintiff on contract by the defendant. In breach of the agreement the

plaintiff paid a lower price resulting in the defendant failing to meet its obligation in terms of the acknowledgement of debt. The plaintiff disputed that fact. Once there is that dispute this court has no option but to refer the matter to the opposed roll for filing of further papers by the parties and full ventilation of the disputed facts. This is not an appropriate case for provisional sentence.

Accordingly I order as follows:

1. The claim for provisional sentence fails and is hereby refused.
2. The matter is referred to the opposed roll with the summons standing as the application.
3. The plaintiff is to file its founding affidavit and any further papers within five days of the date of judgment.
4. The costs shall be in the cause.

Gill Godlonton & Gerrans, applicant's legal practitioners
Matizanadzo And Warhurst, respondent's legal practitioners