WILLIAM PEPUKAI
versus
ITAYI ZIMI

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 4 & 23 July 2020

Opposed matter

K Maeresera, for the applicant
H Mutasa, for the respondent

DUBE J

[1] This is an application for summary judgment brought in terms of Order 10 r 64 (1) of the High Court Rules, 1971.

[2] The brief facts surrounding this dispute are as follows. The respondent signed an acknowledgment of debt (AOD), wherein he admitted owing the applicant the sum of ZW$400.000.00.He failed to pay the debt acknowledged resulting in the applicant issuing summons against him claiming payment on the basis of the AOD. The respondent entered appearance to defend the action. The applicant applies for summary judgment on the basis that the respondent does not have a *bona fide* defence to the claim and that the appearance to defend has been entered solely to delay an unassailable claim because the respondent acknowledged in writing that he owes the sum of ZW$400 000.00 and renounced all the legal exceptions which would otherwise have been available to him.

[3] The respondent refutes that the applicant advanced to him ZW$400 000.00 but that averred that he was advanced the sum of USD$10 000.00. He maintained that he was coerced into signing the AOD for an amount never availed to him.

[4] The issue is whether the respondent was advanced and owes the applicant the sum acknowledged. Order 10 r 64 (1) makes provision for summary judgment and stipulates as follows;

"64. Application for summary judgment

(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs."

[5] The objective of the summary judgment procedure was dealt with in the case of *Bank of Credit & Commerce Zimbabwe Ltd v Jani Investments (Pvt) Ltd* 1983 (2) ZLR 317 (HC) where the court remarked as follows,

> "It is true that summary procedure is the principal means by which unscrupulous litigants, seeking only to delay a just claim by entering appearance to defence, are thwarted. It is thus of the greatest importance that the efficacy of the procedure should not be impaired by technical formalism"

See also, *Rex* v *Rhodium Investments Trust Pvt Ltd* 1957 R&N 723, *Stationery Box (Pvt) Ltd* v *Nateon (Pvt) Ltd & Anor* 2010 (1) ZLR 227 (H), *Beresford Land Plan (Pvt) Ltd* v *Urquhart* 1975 (1) RLR 260 (AD); 1975 (3) SA 619, *Chrismar (Pvt) Ltd* v *Stutchbury* 1973 (1) RLR 277.

[6] The purpose of the summary judgment procedure is to enable a plaintiff who has an unanswerable case to obtain immediate relief by way of an application for summary judgment against a difficult defendant than having to wait for the matter to be dealt with by way of trial proceedings in the ordinary course. The plaintiff is entitled to apply for summary judgment on a claim based on a liquid document, for a liquidated amount in money, for the delivery of specified movable property or for ejectment of a defendant. An applicant in a summary judgement application must show that the applicant has no *bona fide* defence to the action filed and has entered appearance to defend solely for the purposes of delaying proceedings. There must be no disputes of fact arising from the facts in which case, the plaintiff is entitled as a matter of law, to judgment.

[7] The defendant must proffer a *bona fide* defence. He must set out his defence to the application with, "such a degree of candour and particularity," as will enable the court to apply its mind to the b*ona fides* of his defence, see *Merchantile Bank Ltd* v *Star Power CC & Anor* 2003 (3) SA 309. In the case of *Kingstones Ltd* v *LD Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S), at 458F, the court held that not every defence raised by the defendant will succeed in defeating a plaintiff's claim for summary judgment and held a *bona fide* defence to be,

> "...a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a bona fide defence. He must allege facts if established, would entitle him to succeed.''

See also *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) ; *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86.

[8] A defendant to summary judgment proceedings must disclose the nature of his defence and the material facts he relies on. He is not required to deal with his case exhaustively and to prove his defence, see *Stationary Box (Pvt) Ltd* v *Nation (Pvt) Ltd* 2010 (1) ZLR 277. He must merely allege facts, which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence". He must disclose a *prima facie* defence and set it out with such particularity so as to enable the court to make a decision whether he has a *bona fide* defence to the claim. See also *Hales* v *Doverick Inv (Pvt) Ltd 1998* (20 ZLR 235(H); *Cargo Marketing International [Pvt) Ltd* v *Dynamic Afreight (Deutchland) GMBH* SC 170/ 97

[9] The respondent took issue with the applicant's failure to allude to the underlying contract and background facts giving rise to the signing of the AOD in his founding affidavit. In *Barend van Wyk v Tarcon (Pvt) Ltd* SC 49/14, the court said the following of claims premised on an AOD signed subsequent to the original transaction,

> "...it is competent to sue a debtor on his admission of liability as set out in an acknowledgement of debt, without founding the action on the original transaction giving rise to that acknowledgement. See *Mahomed Adam (Edms) Beperk v Raubenheimer* 1966 (3) SA 646 (TPD)."

It is competent for a litigant to premise a claim on an AOD without making any reference to the underlying contract or transaction which gave rise to the AOD. A court dealing with a summary judgement application premised on an AOD need not investigate the terms of the underlying agreement or transaction. The respondent properly premised his case on an AOD.

[10] A respondent who challenges an AOD on the basis that he was forced to sign the AOD, must place before the court sufficient and material details of his defence that enables a court to decide whether he has a *bona fide* defence to the claim and whether he indeed was forced to sign the AOD. He must at least state how he was forced to sign the AOD. He must state the exact nature of the coercion used to make him sign the AOD. It is not sufficient for him to merely state that he was forced to sign the AOD without giving details regarding how he was forced to sign it. Failure to give the allegations of coercion may lead the court to draw an inference that he was not forced to sign the AOD.

[11] In *Knocker* v *Standard Bank of SA* 1933 AD 128 at 132 the court held that "... the person who signs a document is acquainted with its contents". DE*RH Christie in Business Law in Zimbabwe*, 1985 at p 67 echoes the same position and states thus,

> "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 the *caveat subscriptor* rule is therefore that a party to a contract is bound by his signature whether or not he has read and understood the contract…"

[12] Similar sentiments were expressed in the case of *Muchabaiwa* v *Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691(SC) where the court stated the *caveat subscriptor* rule as follows;

> "The general principle which applies to contracts, and commonly designated as caveat subscriptor, is that a party to the contract is bound by his signature, whether or not he has read or understood the contract, or the contract was signed with blank spaces later to be filled in. Expatiating on this principle in *National and Grindlays Bank* v *Yelverton* 1972 (1) RLR 365 (G) at 367; 1972 (4) SA 114 (R) at 116G-H, DAVIES J cited with approval the following statement by INNES CJ in *Burger* v *Central South Africa Railways* 1903 TS 571 and 578 (decided before the promulgation of s 6 of the General Laws Amendment Act):"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 effects of the words which appear over his signature."

[13] The parole evidence rule prevents a party to a written contract from leading extrinsic evidence contradicting, adding or subtracting terms of a contract in a bid to alter the written contract. In the case of *Union Gvt* v *Viavini Ferron Pipes (Pty) Ltd* 1941 AD 43 at p 47, the court stated as follows,

> "Now, this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction, and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence."

[14] In the case of *Johnston v Leal* 1980 (3) SA 927 (A) CORBETT JA said the following of the parole evidence rule at p 943B-E:

> "... it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. "

Where a written transaction is entered into resulting in a written document recording the transaction being executed between parties, any oral evidence contradicting the position in the document is inadmissible.

[15] The defendant does not deny that he signed the document sued upon. His predicament is that he has chosen not to tell anybody how he was forced to sign the document. In his

opposing affidavit, the respondent did not deal with the allegations of coercion, threats or duress. His counsel seems to be not privy to the allegations as well. The respondent has not taken the court into his confidence by failing to canvass details of these allegations. He did not report the alleged threats to the police nor did he take any steps to have AOD invalidated. He was content with the AOD and its consequences. He waited until the applicant approached the courts to recover the debt to allege that he was forced to sign the AOD. He should not expect this court to believe him. Ultimately, the respondent has not alleged facts in his opposing affidavit upon which if he can succeed in establishing them at the trial, would entitle him to be successful in his defence. The court can reasonably infer that he was not forced to sign the AOD. The respondent made himself liable to the applicant in the sum acknowledged.

[16] The presumption that a person who signs a document is acquainted with its contents applies to the circumstances of this case. Once a person appends his signature to a document, he accepts the contents therein. If he cannot show that he was forced to sign the document, he becomes liable for the consequences of the document he signed. In the case of Oasis *Medical Centre* v *Beck and Anor*, HH 84/16 at p 5 of the cyclostyled judgment, the court stated as follows;

> "The signer must beware. Once a person appends his or her signature to a document, it must be known that they are liable for the ensuing consequences and obligations. It was the applicant's responsibility to read the information about what the document entails before entering into the agreement. I do not believe it is proper for the applicant to try and challenge clause 27 of the lease agreement at this moment in time. It remains bound by its signature."

[17] I am unable to find that the respondent was forced to sign the AOD. The respondent is bound by the contents of the AOD. In the absence of any evidence of threats or duress, the caveat *subscriptor* rule binds the respondent. Liability having been established, that puts the matter to rest.

[18] The respondent submitted that the dispute over what was advanced cannot be resolved on the papers and urged the court to dismiss the application. Clearly the applicant's case is that it advanced to the respondent ZW$400 000.00 which the respondent disputes. I do not agree with the respondent that it is common cause that although the respondent signed an AOD suggesting that he received ZW$400 000.00, he in fact was advanced USD$10 000. 00. This assertion is not supported on the papers and is resolved by simply looking at the flawless circumstances of the execution of the AOD. The AOD is the exclusive memorial of the agreement between the parties. The respondent's oral evidence that he was advanced USD10 000.00 does not find

favour with the court in the presence of a properly executed AOD. The AOD does not speak to figure of USD10 000.00. The respondent sought to create an artificial dispute of fact by introducing oral evidence to contradict the transaction recorded in the AOD. The parole evidence rule bars the respondent's attempt to introduce oral evidence of new terms of the AOD. Allowing the respondent to do so would amount in him redefining the agreement between the parties. The respondent's defence cannot be explored past the AOD.

[19] The respondent suggested that the underlying oral loan agreement was tainted with illegality in that having advanced USD10 000.00 to the respondent, the applicant applied an exchange rate which is contrary to s 22 of the Finance Act No. 2 of 2019 and hence acted contrary to a provision of a statute and that the transaction is *null and void ab initio*. He contended that the sum advanced converted to ZW$173 000.00 at the interbank rate of 1: 17 which amount the respondent owes and is prepared to pay.

[20] The Finance Act provides as follows,

> "that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorized dealers exchange the RTGS dollar for the United States Dollars on a willing seller willing -buyer basis.''

This section bars any exchange of currency other than on the basis of this section. There is no suggestion from the AOD of any conversion of money having taken place. Having rejected the argument that the respondent was advanced USD 10 000.00, this argument falls away.

[21] The defendant has no defence at law to exonerate himself from liability.

Accordingly, it is ordered as follows;

1. The application for summary judgment be and is hereby granted
2. The respondent shall pay to the applicant the sum of ZW$400.000.00 together with interest thereon at the prescribed rate of interest calculated from the date of summons to the date of full and final payment
3. The respondent shall pay the applicant's costs

Chizengeya Maeresera & Chikumba, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners