

BELL PTA (PVT) LTD  
versus  
CHROMEBASE MINING COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE  
DUBE JP  
HARARE, 25 September 2024 and 29 November 2024

### **Provisional Sentence -Opposed**

*T Chagudumba*, for the plaintiff  
*D Madzivire*, for the defendant

### **DUBE JP**

#### *Introduction*

1. This is an application for a provisional sentence order premised on a letter and an email written by the defendant. At the hearing of the application, the parties were directed to file heads of argument after which they agreed that the matter be dealt with on the papers. After considering the arguments of the parties, I was not satisfied that the defendant has a defence to the claim and granted judgment in favour of the plaintiff.

#### *Background*

2. The parties entered into a commercial transaction for the sale of dump trucks to the defendant. Subsequent to that, the plaintiff claimed that it is owed \$54 304.77 by the defendant. In a debtor circulation letter sent by the plaintiff to the defendant dated 8 February 2024, a request for confirmation of the balance in its favour was stated in part as follows:

“In connection with the audit of our financial statements, we are writing to you requesting that you confirm the following balance in our favour of USD \$54 304.77 as at 31 December 2023. If your records are in full agreement with the above balance, please confirm this on the attached copy of this letter by signing and returning it directly to our offices ..... If your records are not in full agreement with the above balance, please provide the amount(s) shown in your records together with details of all differences, including balances on any accounts not listed above.”

3. On 10 February 2024, the defendant through its accountant responded in what appears to be a standard letter addressed to the plaintiff as follows:

“We confirm that we are in agreement with the above-mentioned balance of USD54,304.77 in your favour at 31 December 2023.”

On 05 March 2024, the plaintiff addressed an email to the defendant in which it specifically stated the amount owing as USD54,304.77 and requested payment thereof and at the same time threatening legal action.

4. On 17 March 2024, the defendant responded via email as follows:

“We have been endeavouring to meet your deadline and I anticipate that your next response is that you have no further option but to handover to your lawyers. However, Be rest assured that getting payment to you is top priority to us.

A) As I have explained, we have started a new contract ...and this contract is 4 times bigger in terms of net margins ...and have already allocated proceeds from that towards settlement of the debt and hope to get some financial stability from this.

B) Our other option which would avoid legal costs and the legal route as if we are not on talking terms is to identify one truck to take to auction or to set off and the net proceeds be used to settle. ...I would say please kindly give us 7 more days but to be on the safe side, month-end seems to be reasonable. This will serve ourselves and myself unnecessary legal costs, legal process and back and forth.”

5. The plaintiff averred that the defendant failed to settle its indebtedness to it being the balance of the purchase price of dump trucks sold to it. On 5 September 2024, the plaintiff issued summons for provisional sentence which has as its cause of action an acknowledgment of debt. The plaintiff relied on exchanges made between the parties as a basis for the provisional sentence summons. It contended that based on the contents of the letter of 10 March 2024 and email of 17 March 2024, the defendant acknowledged the debt and that these documents constitute liquid documents as contemplated by r14(1) of the High Court Rules 2021, entitling it to an order for provisional sentence.
6. The application being unopposed was enrolled on the unopposed roll. At the hearing, the defendant attended and did not deny authoring and signing the letter and email relied on, its main contention being that it did not acknowledge the debt in the sum claimed. It raised a *point in limine* arguing that the provisional sentence summons is incompetent and fatally defective for want of compliance with r14 of the High Court Rules. It argued that the letter of 10 February 2024 authored by it, is not an acknowledgment of debt or liquid document as contemplated in r14. It maintained that the purported liquid document relied upon is merely a confirmation of ledger balance and has nothing to do with the defendant’s liability to the said amount as it is and does not constitute an unequivocal admission of liability. It contended in addition that the purported acknowledgment of debt lacks the essential elements of an acknowledgment of debt in that it neither reflects defendant’s

liability to indebtedness nor does it reflect the time period within which the debt will be paid, the number of instalments if any and how payment will be made as required in a valid acknowledgment of debt.

7. On the merits, it maintained that the letter relied on does not constitute an AOD. It challenged the claim on the basis that confirmation of the ledger balance of USD \$54 304.77 was requested for audit purposes of plaintiff's financial statements only and cannot be an AOD or a liquid document. It further averred that the confirmation was done before any reconciliation of the defendant's accounts was done and on a without prejudice basis. It argued that the amount claimed is inflated and not a correct reflection of the amount owed as the plaintiff had, in coming up with its claim, not taken into account credit notes worth USD \$45 436. 58 due and payable to the defendant by the plaintiff and loss of revenue production incurred by the defendant as a result of plaintiff's breach of warranty. It stated that two of the dump trucks' equipment in warranty suffered transmission and other defects resulting in loss of production and revenue. It maintained that the plaintiff replaced the faulty transmissions with substandard reconditioned ones with a lower value than new ones. The defendant took issue with the plaintiff's failure to file an answering affidavit addressing these averments and contended that this means that the amount claimed by the plaintiff is disputed.

#### *The Issue*

8. It is common cause that the defendant owes the plaintiff some money. The parties haggled over amounts owed and whether the plaintiff was entitled to bring a provisional sentence summons. The central issue is whether the letter and email relied on constitute an acknowledgment of debt and are liquid documents.

#### *The law*

9. Rule 14 of the High Court Rules, 2021 stipulates as follows:

“14(1) 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.”

A plaintiff who is a holder of a valid acknowledgment of debt, a liquid document, has an entitlement to seek provisional sentence in terms of r14 to recover the sums owed in terms thereof. The purpose of the provisional sentence procedure is to permit a plaintiff armed with a liquid document to obtain a quick remedy without following the time consuming

and expensive trial route. The procedure impedes a defendant without a defence to a claim and affords a litigant who is a holder of a valid acknowledgment of debt a speedy remedy. Once armed with a liquid document, a creditor has an entitlement to use it to recover and obtain payment of the debt acknowledged without having to wait for the final determination of the dispute between the parties, see *Zimbank v Interfin* ZLR 2005(1) 114. Whether a plaintiff will be successful in a provisional sentence claim based on an AOD depends on, its existence, the circumstances surrounding its making and the terms thereof.

10. An AOD or any other form of liquid document in which a debtor acknowledges its indebtedness in a fixed or ascertainable sum of money raises a rebuttable presumption of indebtedness. In *Sibanda v Machaidze* 2010 (1) ZLR 216 (H), the term liquid document was defined as follows:

“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.”

11. This case emphasizes the requirement for a clear, unequivocal and unambiguous written promise to pay a debt. In *Gula – Ndebele and Partners v AG Venture (Pvt) Ltd*, HH 39/12 the court relied on the following sentiments expressed in *Rich & Ors v Largerwey* 1974 (4) SA 748 at 745 (H) and enunciated the requirements of a liquid document as follows:

“If the document in question, upon proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto, is an unconditional acknowledgment in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted.”

12. A liquid document by its terms should disclose indebtedness that is fixed or easily ascertainable. A liquid document must by its terms demonstrate an acknowledgment of debt that is unconditional. The law does not specify the list of documents that qualify as liquid documents, that role being left to the courts. In *Twee Jonge Gezellen (Pty) & Anor v Land and Agricultural Development Bank of South Africa t/the Land Bank* 2011 (3) SA 1 CC @15 the court defined a liquid document as follows:

“In principle, however, a document is liquid if it demonstrates, by its terms, an unconditional acknowledgement of indebtedness in a fixed or ascertainable amount of money due to the plaintiff. Many different sorts of documents have been found to qualify as “liquid” in terms of this definition and therefore sufficient to found provisional sentence. They include acknowledgments of debt, mortgage bonds, covering bonds, negotiable instruments, foreign court orders and architects’ progress certificates.”

13. An acknowledgment of debt constitutes a liquid document where it meets the following requirements :

- i) the acknowledgement must have been made by the debtor;
  - ii) there must be express or tacit acknowledgement of the existence of liability
  - iii) the acknowledgement must have been made in favour of the creditor or his agent,
- see, *First Merchant Bank of Zimbabwe Ltd v Forbes Investments (Pvt) Ltd & Anor* 2000 (2) ZLR 221 (S) : *Pioneer Properties (Pvt) Ltd v Message Ncube t/a Foundation College* HH 23/04.

14. The AOD must have been executed by the debtor in favour of the creditor. The acknowledgment may either be direct, explicit or tacit. There must be a voluntary admission by the debtor that he or she owes a clearly stipulated amount of money to the creditor. Where a written AOD is relied on, the court must be satisfied that the defendant signed a document specifically to acknowledge liability to the debt, see *Allan Briggs v Lawrence Billiati and Another* HH 749/15 where the court stated thus:

“... 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.” See also *Caltex (Africa) Ltd v Trade Fair Motors and Anor* 1963 (1) SA 36 SR.

15. Where a defendant disputes the signature on a document as his or that of his agent, the onus is on the plaintiff to show that the signature belongs to the defendant or his agent, see *Donkin v Chiadzwa* 1987 (1) ZLR 102 (H). The defendant must show that the plaintiff does not enjoy a high probability of success in the main matter, see *Zimbank v Interfin Merchant Bank of Zimbabwe* 2005 (1) ZLR 114 (H).

16. A validly executed AOD constitutes a conclusive admission of debt which is legally enforceable against the debtor. The court must satisfy itself that the defendant has no chances of succeeding in the principal case. Only a *bona fide* defence can defeat a summons for provisional sentence. In *Kingstons Limited v L. D. Innerson Private Limited* SC 8-06 a *bona fide* defence was held in 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 which if established, would entitle him to succeed”.

17. An email is acceptable as a valid AOD provided it meets the requirements of a valid liquid document, see *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA); *Suitemind Investments (Pvt) Ltd v Grindale Engineering* HC 1610/16; *Suitemind Investments (Pot) Ltd v Grindale Engineering* HC1610/16. In *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another*, 2015 2 SA 118 (SCA).

*Application of the law to the facts*

18. In its *point in limine*, the defendant challenged only the letter of 10 February 2024. It ignored the contents of the email of 17 March 2024 and failed to explain nor allude to it at all choosing to focus only on the letter. Having failed to challenge the email, it is taken to have admitted that it is an AOD and a liquid document for that matter. The defendant cannot now seek to rely on further evidence to prove or disprove the admitted facts. See *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise & Ors* 1993 (2) ZLR 127; *Mining Industry Pension Fund v DAB Marketing (Pvt) Ltd* 2012 (2) ZLR 132(s). The email on its own constitutes an AOD. Its contents having been admitted, it was not incumbent upon the plaintiff to answer to the defendant's opposition.
19. In its email dated 17 March 2023, the defendant reassures that plaintiff that payment of the specific sum of money is imminent and that it is endeavouring pay the sum owed. Despite the challenges the defendant expressed, it showed a willingness to settle the debt as confirmed and a preparedness to sell off one of its trucks in order to settle the indebtedness. It requested "7 more days but to be on the safe side, month end seems to be reasonable" to settle the debt. The defendant was desirous of paying the amount claimed and avoid legal costs. This stand point exhibits a serious intent to meet the deadline to pay the sum owed and gives itself deadlines. The debtor understood the implications of its acknowledgment of the debt. The email reveals an unreserved and unqualified acknowledgment of debt.
20. The defendant confirmed the sum owed to the plaintiff in the letter to the plaintiff. The letter was generated and signed by the defendant and its signature is not impugned. It contains a clear and concise statement as regards the balance of USD54,304.77 owing to the plaintiff. The acknowledgment of debt contained therein is express and unambiguous regarding the defendant's agreement with the amount claimed. The sum owed is clearly stated, fixed, unambiguous, fully ascertained and the letter unequivocal on the sum owed. The letter constitutes a liquid document.

21. The letter and email relied on must be read together and constitute a written promise to pay the debt owed to the plaintiff. An acknowledgment of debt which qualifies as a liquid document was made. Upon a proper construction of the contents of the letter and email of the defendant, one has no need for extrinsic evidence to conclude that an unqualified written promise to pay a debt was made. The proposition that an AOD must state the time period the instalments are to be made or manner of payment of the debt was rejected in *Takawira v ZISCO* HB 42/18 and has no basis at law.
22. The defendant failed to discharge the onus upon it to show that it did not acknowledge the debt and that the AOD is not liquid. Despite a call by the plaintiff to confirm the balance and if the defendant's records are not in full agreement with the sum claimed, to provide amounts shown in its records together with details of all performance issues, it did not do so. When the defendant did the letter and email to the plaintiff acknowledging its indebtedness in the sum claimed, it must have been aware of the its own claim and purported credit notes and other documents relied on some of which predate the AOD. The defendant had the opportunity to challenge the sum claimed. It nonetheless failed to do so or include details of its own claim in its responses, despite the invitation to do so, confirming instead the sum claimed and only bringing to the fore its own claim on 24 June 2024, way after acknowledging the indebtedness.
23. The defendant has not proffered any plausible explanation for its failure to raise its defences at the time of confirmation of the sum owed. I see no logical reason why the defendant would proceed and confirm the ledger balance if indeed it owed much less than the amount claimed. Neither the letter of 10 February 2024 nor email of the 17 March states that it was signed on a without prejudice basis as suggested. Whether the confirmation was required for audit purposes or any other purpose for that matter, it needed to be based on a correct reflection of the balance outstanding. That point fails.
24. The warranty, repairs and performance issues as well as the claim for loss of business are separate causes of action altogether and not before the court. The defendant has not brought the claims for which he must sue separately. This defence amounts to a red herring. No *bona fide* defence against an order for provisional sentence was advanced.
25. The defendant having confirmed the debt owed for a stated amount without any reservations, conditions or mention of any disputes, an unconditional acknowledgment of indebtedness was made. The AOD was not subject to any verification of amounts owing in the future or any audit. The plaintiff is entitled to rely on it. Once the defendant signed the

acknowledgment of debt, the need to probe into the transaction giving rise to it fell away entitling the plaintiff to bring a claim based on the AOD. The defendant has not explained its failure to honour part of the debt acknowledged. The defendant is not being *bona fide* when it claims that it owes a lesser amount. The letter of 10 February 2024 as read with the email of 17 March 2024, do not serve merely as confirmation of ledger balance, but constitute an acknowledgment of debt and confirms liability coupled with a preparedness to liquidate the debt as acknowledged.

26. The probabilities of success in the principal case are against the defendant. The court is satisfied that this is a proper case where provisional sentence ought to be granted in favour of the plaintiff, the defendant having failed to present a plausible defence, entitling it to defeat plaintiff's claim for provisional sentence.
27. I am not persuaded that a punitive scale of costs is merited considering that the plaintiff made no attempt to state fully and justify reasons for this scale of costs. Costs on a higher scale are not there simply for the asking. Courts will only make an award of costs on a punitive scale where the conduct of a party is repugnant deserving to be censured.

Accordingly, it is ordered as follows:

1. The claim for provisional sentence be and is hereby granted.
2. The defendant shall pay to the plaintiff the sum of US\$54,304.77 together with interest at the prescribed rate with effect from 1 August 2024 to date of full payment.
3. Defendant shall pay the plaintiff's costs of suit.

*Atherstone & Cook*, plaintiff legal practitioners  
*Makururu & Partners*, defendant's legal practitioners