

MERCY MAZVITA NYAMANHINDI
versus
GIFT CHIVHURAWA

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 12 SEPTEMBER 2016 AND 15 SEPTEMBER 2016

Civil Appeal

N Hlabani for the appellant
J Mandevere for the respondent

MATHONSI J: This is an appeal against the judgment of the magistrates court sitting at Gweru delivered on 4 November 2015 in which it granted summary judgment in favour of the respondent in the sum of \$3750-00 together with interest at the rate of 5% per annum from 2 June 2015 to date of payment and costs of suit on an attorney and client scale.

The appellant takes issue with that judgment on the grounds that the court *a quo* misdirected itself in failing to appreciate that she had a valid and *bona fide* defence to the claim by virtue of the fact that the respondent had seen it fit to file an answering affidavit, an admission that there were triable issues. In addition, the respondent approached the court with dirty hands because the parties had entered into an illegal loan agreement which could not be enforced in a court of law as the respondent sought to unjustly enrich himself at her expense. She also takes issue with the award of attorney and client costs.

The brief background is that the appellant signed an affidavit before a commissioner of oaths on 7 May 2015 which reads:

“I Mercy Mazvita Nyamanhindi 29-225330 M42 residing at 1819 Boogie Road Riverside Gweru do hereby solemnly and sincerely swear/declare the following: that I owe Chivaura Gift 22-226879A 22 the sum of USD 3750 – three thousand seven hundred and fifty dollars only. I undertake to pay the full amount on or before 2 June 2015.”

When the respondent sued out a summons for payment of the sum acknowledged as owing by the appellant out of the magistrates court in Gweru, the appellant was quick to enter appearance to defend and file a request for further particulars demanding an array of extraneous

information. She sought to know the person who drafted the affidavit attached to the summons, the circumstances under which it was signed, whether there were witnesses when the money was advanced and whether the demand for payment had been in writing or verbal.

The respondent filed an application for summary judgment on the basis that the appellant had not a *bona fide* defence to the claim as his claim was unassailable premised, as it was, on a sworn statement deposed to by the respondent before a commissioner of oaths. The application was opposed by the appellant.

The gravamen of the appellant's disquiet is contained in paragraph 2 of her opposing affidavit which reads:

"2. Ad Paragraph 3-14

As shown on record, I filed my request for further particulars on the 21st September 2015 and accordingly served it on the Applicant. The request for further particulars clearly shows that I have a valid defence to the applicant's claim. The applicant gave me a loan of US\$300-00 something early this year. The terms of the loan agreement [were] that it would attract a hefty interest of 20% per month.

At the material time I was forced to sign the affidavit because the applicant, being a ZIMRA official had indicated that he was going to impose several fines and taxes on my struggling business Shortlink Investments. Since my business is my sole source of income to which my parents and my little daughter survive on, I was forced to sign it."

In my view, a defence has never been more bogus. It certainly cannot withstand scrutiny. It is unfortunate that the appellant did not state the exact date when the alleged loan of \$300-00 was advanced to her, or whether it was advanced at the time that she signed the acknowledgement of debt on 7 May 2015 or at the beginning of 2015. She did not state what she meant by "sometime early this year."

Whatever the case that story does not make sense. Assuming by that phrase she meant January 2015, it means that when she signed the acknowledgment of debt on 7 May 2015, a period of 4 months had lapsed since the \$300-00 was advanced to her. If that were the case interest at the rate of 20% per month would be \$60-00 x 4 months which equals only \$240-00. It means therefore that she should have acknowledged indebtedness in the sum of \$300-00 plus \$240-00 interest which equals only \$540-00 and certainly not the sum of \$3750-00 that she acknowledged.

On the other hand assuming that by the phrase “sometime early this year” is meant on 7 May 2015, a date which is clearly not early in the year, and considering that she was undertaking to repay the money in one month’s time on 2 June 2015 it means that if interest was reckoned at the rate of 20% per months barely \$60-00 would have accrued by that date. She should have acknowledged indebtedness in the sum of only \$360-00 and not \$3750-00.

What is more, reference to the respondent being a ZIMRA official who would impose fines and taxes on her struggling business appears farfetched and disconcerting to the defence that is sought to be raised, if not completely detached from it. It does not explain why she took the loan from what was an unmitigated loan shark. She does not say that she was forced to take the money. Surely if there were such strings attached to it, she should have simply refrained from taking it. She also does not say when and how she paid it back.

Little wonder the court *a quo* was not impressed by that defence. It reasoned thus:

“The acknowledgment was signed on 7 May 2015 and commissioned by a legal practitioner from Danziger and Partners Patience Takayendesa. Since then respondent (appellant therein) has neither reported the alleged threat to police nor approached the courts seeking the invalidation of affidavit. She does not say what will or has become of the fear of reprisals by the ZIMRA official now that she has decided to oppose the application and allege she was forced to sign. Respondent therefore has not raised a plausible cause. Her affidavit lacks clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. Respondent cannot just sign a document and six months later when a demand is made based on the document suddenly allege that she was forced to sign. The ‘*caveat subscripto*’ rule demands that she must be bound by her signature.”

I am unable to discern any misdirection in that reasoning. The court *a quo* applied the correct legal principles which govern an application for summary judgment and concluded, correctly in our view, that the appellant had failed to show a plausible defence to the claim. The considerations in an application for summary judgment are well settled in our law. The test to be applied to the respondent’s opposing affidavit is that the respondent must allege facts which, if established at the trial, would entitle her to succeed in her defence. See *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723. She must establish that there is a plausible case and that there is a real possibility of an injustice occurring if summary judgment is granted. See *Jena v Nechipote* 1968 (1) ZLR 29(S) 30 D-E.

The opposing affidavit must also set out material facts on which the defence is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses on *bona fide* defence. See *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) 238 G; 239A.

These are the principles that were applied by the court *a quo* and there is no misdirection whatsoever. The appellant is relying upon duress in order to impugn an acknowledgment of debt that she signed. As stated by the learned author R. H. Christie, *Business Law in Zimbabwe*, 2nd edition, Juta & Co Ltd, at page 83:

“The threat must be of an imminent or inevitable evil, meaning that it cannot be averted otherwise than by agreeing to the contract.”

Unfortunately that cannot be said of the appellant. She could have avoided the contract. She is deliberately being vague in order to create an impression that she may have a case when she has none. Parties who are quick to sign documents acknowledging indebtedness must know that first and foremost, the law accepts that they are bound by whatever appears above their signature on the basis of the *caveat subscripto* rule.

If they allege duress in appending a signature they must satisfy the requirements of the law for vitiating consent to a contract, that is to show that when contracting they were acting under the physical or moral constraint of the other party or a third party. They should not be content with fanciful and vague allegations which they cannot particularise. See J. W. Wessels, *The Law of Contract in South Africa*, Vol 1, 2nd edition, Butterworths & Co Ltd at paragraph 1165.

We conclude therefore that the appeal has no merit. It is accordingly dismissed with costs.

Bere J agrees.....

Makonese Chambati and Mataka, appellant’s legal practitioners
Kadzere, Hungwe & Mandevere, respondent’s legal practitioners