

SIBANYE BURIAL SOCIETY

Versus

BEATRICE SIBANDA a.k.a. BEATRICE GUMEDE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 2 June 2020 & 11 June 2020

Civil trial

V. Chagonda, for the plaintiff
L. Mpfu, for the 1st defendant

DUBE-BANDA J: On 18 August 2017, the plaintiff issued summons against the defendant claiming the sum of US\$13 238.00, it being an amount allegedly deposited with the defendant in her capacity as the treasurer of the plaintiff. It is alleged in the summons that defendant has failed, refused or neglected to pay over the deposited amount to the plaintiff on demand.

In her plea, defendant resists the claim primarily on the basis that no demand was made to the defendant; and that members were aware of the fact that defendant was robbed of all the money a few days after it was deposited with her when robbers broke into her house. At the time the plea was filed, it was alleged that the robbery was reported to the police and the matter was still pending. At the time of the trial, defendant alleged that she was arraigned for the theft of the funds, convicted by the magistrate court, and the conviction was set aside by this court. It is further alleged in the plea that defendant was robbed of the money hence she cannot be expected to pay for the loss as the plaintiff assumed that risk by having her keep the money.

The facts giving rise to this claim are largely common cause. I summarize them as follows; plaintiff a burial society, is a *universitas*, with standing to sue and to be sued in its name. It is constituted for the purpose of providing for the funeral expenses of a member or member's beneficiary. Plaintiff raises its revenue from the monthly subscriptions paid by its members. In terms of the plaintiff's constitution, the funds are deposited with its treasury, to be so kept until such time that a demand is made. At the material time the defendant was the treasurer of the plaintiff. A sum of US\$13 238.00 was deposited with her to keep in terms of the plaintiff's constitution.

Defendant contends that the members of the plaintiff are aware of the fact that she was robbed of all the money. A report of the robbery was made to the police. As a result of its investigations, the police preferred a charge against the defendant. She was charged with the crime of theft, as defined in section 113(2)(d) of the Criminal Law (Codification and Reform Act) Chapter 9:23, it being alleged that, on a date unknown to the prosecutor, but during the period ranging from 6 February 2016 to the 11 February 2016, and at house number 21552 Pumula South, Bulawayo, she, in violation of a trust agreement which required her to keep cash amounting to \$13 238.00 on behalf of Sibanye Burial Society and return it upon demand by the society and in violation of the agreement, converted the money to her own use. The magistrate court returned a verdict of guilty. However, the guilty verdict was overturned by this court, sitting as an appeal court.

In the pre-trial conference minute the following appears:

Issues

1. Whether or not the sum of US\$13 238.00 was stolen from the defendant during a robbery.
2. If so, whether or not the defendant is excused from liability as a result of such robbery.

Onus

On the defendant on all issues.

Duty to begin

On the defendant.

As it appears from the pre-trial conference minute, the seat of the *onus*, in respect of the two issues for trial, is on the shoulders of the defendant. She had a duty to begin.

At the trial of the matter, defendant testified. Her testimony is that at the material time she was the treasury of the plaintiff. Her duties were to have custody and protect the safe that contained plaintiff's money. It was a lockable safe. The keys to the safe were kept by another member of plaintiff. She says that plaintiff's money amounting to US\$13 238. 00 was stolen from her, during a robbery. The robbery is alleged to have occurred on the 13 February 2016. She says two men broke into her house at approximately 2 a.m. One of the man put a knife on her throat and demanded money. Her testimony points to the fact these alleged robbers knew of the existence of the safe containing plaintiff's money in her house. She thought the robbers would kill her, she then handed over the safe to them. She says she screamed when the robbers got into her house, and screamed again after the robbers left her house. She says it is the second scream that alerted her children and neighbors, that there was something amiss at

the house. As a result of the second scream, her children and neighbors woke up and attended to her. She checked and saw that the robbers gained entrance through the toilet window. She says the robbers broke the window. A close neighbor who attended the scene, one Diliza Moyo, telephoned the police. She says the police decided to charge her with the crime of theft. She was convicted at the magistrate's court. On appeal to this court, the conviction was set aside.

One Diliza Moyo testified for the defendant. He says was awakened by a woman's scream at approximately 2 a.m. He quickly noted that the scream was emanating from his neighbor's house, i.e. defendant's house. He got there and he was informed that a robbery had occurred, he did not see the robbers. He then in the company of another neighbor made a police report.

Plaintiff's version was narrated by one Benita Sibanda. She is the president of the plaintiff. She says defendant is the treasury of the society, and she was responsible of keeping plaintiff's money in terms of the constitution. Defendant agreed to keep the money for the plaintiff. This witness told the court that on the 12 February 2016, she participated in the counting of the money, and it was found that it was in the sum of US\$13 238.00. The counting of the money happened a day before the night of the alleged robbery, i.e. the 13 February 2016. Plaintiff was then informed that the money was stolen during a robbery at defendant's house. The sting of her evidence is that in terms of clause 4 of the plaintiff's constitution, defendant has an obligation to refund plaintiff the stolen money. During cross-examination, she stuck to her version, that in terms of the constitution, defendant must refund plaintiff's money.

Was the money stolen during a robbery?

The defendant testified that she was attacked by two robbers at approximately 2 a.m. The robbers made off with the safe containing plaintiff's money. During cross-examination, plaintiff's counsel took issue with how the robbers allegedly gained entrance into defendant's house. Counsel further took issue with the fact that, although defendant says she screamed twice, when the robbers entered the house and after they left, it is only the second scream that appears to have been heard by her children and the neighbors. Counsel tried without success to prick holes on defendant's version, that the money was stolen during a robbery. Counsel was not successful in this endeavor.

In essence the evidence of the defendant that there was a robbery at her house and that the money was stolen by the robbers is largely uncontested. I am satisfied, that on a balance on probabilities, defendant has proved that on the 13 February 2015, there was a robbery at her house and plaintiff's money was stolen during that robbery. Therefore, the first issue, whether or not the sum of US\$13 238.00 was stolen from the defendant during a robbery, is answered in favour of the defendant.

Is the defendant is excused from liability as a result of such robbery?

On the basis of the above finding, I now have to ascertain whether the defendant is liable to the plaintiff as claimed. Plaintiff's claim is anchored on a contract of *depositum*. In its declaration, the plaintiff alleged that the defendant was in breach of the contract between the parties as it failed to return to the plaintiff money deposited with her.

Regarding the nature of the contract that the parties concluded, I am clear that this was a depositum contract. *Depositum*, as a concept, was, as would be expected, developed by the Romans. A contract of *depositum*, or deposit, as we now call it, is "... a contract in which one person (*depositor*) gives another (*depositarius*) a thing to keep for him *gratis*, and to return it on demand ... the ownership of the thing is not transferred, but ownership and possession remain with the depositor The receiver is not allowed to use it" – Hunter W.A., *A Systemic and Historical Exposition of Roman Law in the Order of a Code* (2nd Ed) William Maxwell and Son, London 1885.

In *B.C. Plant Hire cc t/a BC Carriers v Grengo (SA) (Pty) Ltd* (2004) 1 All SA 612 (C), the court held that a contract of *depositum* comes into existence when one person (the depositor) entrusts a moveable thing to another person (depository) who undertakes to care for it gratuitously and to return it at the request of the depositor. The depository does not benefit from the deposit in any way. If the depository uses the thing, then this is considered a *furtumusus*. The depository can only be found liable where gross negligence (*culpa lata*) is established. See also *Ncube v Hamadziripi* 1996 (2) ZLR 403 (HC); *Munhuwa v Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 H; *Smith v Minister of Lands and Natural Resources* 1979 RLR 421(G); 1980(1) S.A 565 (ZH).

The liability of the depository to compensate the depositor for the loss or damage occasioned by the depositor's negligence depends on whether the depositor was gratuitous or for reward. Because a gratuitous deposit is entirely for the benefit of the depositor, the depository is only bound to take the same care of the property as he would of his own

property. So if the property is destroyed, damaged, lost or stolen, he is liable only for gross negligence or for fraud. Before the court holds a depository liable, it must determine the presence or absence of gross negligence. In the absence of gross negligence, a depository cannot be found liable. See *Ncube v Hamadziripi* 1996 (2) ZLR 403 (HC), *Transitional Local Council of Randfontein v ABSA Bank* [2000] 2 All SA 134 (W), 2000 (2) SA 1040 (W).

This was a contract for deposit – gratuitous. It was entirely for the benefit of the plaintiff. The jurisprudence shows that the defendant is only bound to take the same care of the money as he would of his own property. So if the money is stolen, she is liable only for gross negligence or for fraud. Before the court hold defendant liable, it must determine the presence or absence of gross negligence.

The robbers broke into defendant's house. At approximately 2 a.m. One of the man put a knife on her throat and demanded money. It appears that the robbers knew of the existence of the safe containing plaintiff's money in her house. She says she thought the robbers would kill her, she then handed over the safe to them. In the circumstances, I find that there is nothing more defendant could have done, except to hand over the safe containing the money to the robbers. There is nothing she could have done differently. No negligence can be imputed to her, let alone gross negligence.

Clause 4 of the plaintiff's constitution

During the course of the trial, plaintiff's counsel argued that in terms of clause 4 the plaintiff's constitution, defendant is liable to refund the sum of US\$13 238.00. Clause 4 says:

The treasury should be a person who owns a house in Pumula south meaning should be a resident there. Moreover if the treasurer has to travel she should inform the Committee and leave the purse. If she does not do that, there shall be a fine of US\$5.00. If the money goes missing or she absconds with the purse we shall report to law enforcers / courts that she must pay. (My emphasis).

Clause 4 of the Constitution is not pleaded. However, this issue was extensively canvassed by both parties during the trial. Can this court now entertain this issue, which was not pleaded?

Pleadings serve the important purpose of identifying the issues that require determination by a court and also enabling a defendant to know the case he has to meet before the court. To this principle however there is a qualification. In a limited sense, a court

can adjudicate on issues not raised on the pleadings even when no amendment has been applied for.

In *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A), 433, CENTLIVRES

JA, referring to an issue not raised on the pleadings but fully canvassed at the trial, said:

”This court, therefore, has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial.“

Further in *Middleton v Carr* 1949 (2) SA 374 (A) at 385, SCHREINER JA, in similar vein, stated: “Where there has been full investigations of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised.”

In *Sager’s Motors (Pvt) Ltd v Patel* 1968 (2) RLR 267 (A), Lewis AJA accepted that the above remarks correctly reflected the position in this country. At page 274 A – B he stated: The *ratio decidendi* of the cases ... referred to above is that where there has been a full and thorough investigation into all the circumstances of the case and a party has had every facility to place all the facts before the trial court, the court will not decline to adjudicate on an issue thus fully canvassed simply because the pleadings have not explicitly covered it.“

The above remarks were cited with approval by this Court in *Guardian Security Services (Pvt) Ltd v ZBC* 2002 (1) ZLR (S), 5 D – H, 6 A-B. That a court can determine an issue that is fully canvassed but not pleaded is therefore now settled in this jurisdiction.

As clause 4 of the constitution is not pleaded, and as a result at the pre-trial conference the issue of where the *onus* lies in respect of this issue, did not arise, I take the view that he who alleges must prove. Plaintiff must prove that in terms of section 4 of its constitution, defendant is liable for the amount of \$13 238.00.

Implicit in the evidence, cross-examination and the submissions of the parties is the suggestion that, although not pleaded, the issue of clause 4 of the constitution is important in this case before the court. I proceed to consider whether defendant is liable by virtue of clause 4 of the constitution. This clause says if the money goes missing or she absconds with the purse we shall report to law enforcers / courts that she must pay. Clause 4 anticipates two scenarios, is either the money goes missing or she absconds with it, in either eventuality, a

report shall be made and she must pay. In *casu*, she did not abscond with the money. Did the money go missing, as contemplated by clause 4? The internet dictionary, the word missing is defined as “(of a thing) not able to be found because it is not in its expected place.”

I find that the word “missing” excludes robbery. Defendant is not saying “the money was in my house, I do not know what happened to it.” In this sense the money would have gone missing. In *casu*, she is saying the money was stolen during a robbery. She is able to explain what happened to the money. She knows where it is. It is in the pockets of the robbers. Just that they cannot be found. In this sense, in my reading of clause 4 of the constitution, the money is not “missing.” Defendant, cannot be held liable on the basis of clause 4 of the constitution.

There remains to be considered the costs of this case. No good grounds exist for a departure from the general rule that costs follow the event. The defendant has been successful in this litigation and is clearly entitled to her costs.

Disposition

The two issues posed and identified at the pre-trial conference, being; whether or not the sum of US\$13 238.00 was stolen from the defendant during a robbery; and if so, whether defendant is excused from liability as a result of such robbery, are answered in defendant’s favour. In the result, plaintiff’s claim is dismissed with costs of suit.

Calderwood, Bryce Hendrie & Partners, plaintiff’s legal practitioners
Mlotshwa & Maguwudze, defendant’s legal practitioners