

BELOVED DHLAKAMA
versus
JACARANDA REAL ESTATE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 11, 25 OCT & 24 NOV. 2022

TRIAL

Ms. H. Ndudzo, for the Plaintiff.
Ms. M. Mahenga, for the Defendant

NDLOVU J: The Plaintiff, in his capacity as the Executor Testamentary of the Estate of the late Richard Alwin Matthews issued Summons out of this court against the Defendant claiming payment of a sum of US\$16 149-42 being a loan advanced by the now deceased during his lifetime to the Defendant, plus interest thereon at the prescribed rate from the date of service of summons to date of the full and final payment plus costs of suit on a legal practitioner and client scale.

Although admitting liability, Defendant defended the claim. The only issues between the parties are

1. Whether or not there was an acknowledgment of the debt by the defendant in 2021?
2. Whether or not the debt is payable in United States of America Dollars [US\$] or in Zimbabwean Dollars [ZWL\$] and if payable in US\$ what rate should be used in converting it to ZWL\$?

BACKGROUND FACTS

Shortly before the death of Mr. Matthews, in December 2020, Plaintiff attended to him to take instructions. The now-deceased told him of the loan he had advanced to the Defendant in 2015. Ms. Joyce Kachale was the Co-Director and Shareholder of the Defendant. After the now-deceased passed on, Plaintiff and Ms. Kachale had several meetings pertaining to the repayment of the loan, among other things. Ms. Kachale on behalf of Defendant acknowledged the debt owed by Defendant to the deceased's estate. The discussions touched

on the shares in Defendant and the possibility of the beneficiaries of the now-deceased estate giving Ms. Kachale the now-deceased shares in Defendant. Ms. Kachale brought to the attention of Plaintiff the need for Defendant to move its operations from the deceased's house elsewhere. That movement would entail uninstalling the solar power system that Defendant had installed at the now deceased's house and Ms. Kachale considered that that would be inhuman. Plaintiff drafted an acknowledgment of debt, per the parties' agreement in which terms of how the debt would be liquidated by Defendant were stated. The acknowledgment of the debt draft was sent to the Defendant through Ms. Kachale who in turn responded via an email dated 20 April 2021. The acknowledgment of the debt document was not signed.

PLAINTIFF'S CASE

Plaintiff's case is principal that, Defendant through its only surviving Director Ms. Joyce Kachale Ashby acknowledged the debt it is owing to the estate of its now deceased Director. Not only did it acknowledge its indebtedness, but it also acknowledged the currency in which it was in and will be settled. That currency is the US\$ and therefore Defendant should not approbate and reprobate and should settle the debt in US\$. Plaintiff argued that from the two documents filed of record it is clear that there was a meeting of the minds between the parties on the amount to be paid and the currency in which it was to be paid, hence the need to deduct the cost of the solar power installations done at the now deceased's house. Accordingly, the only reasonable conclusion consistent with the circumstances surrounding the proven facts is that both parties were in agreement that the debt was to be paid in US\$. Plaintiff further argued that the response by Defendant's representative to the draft acknowledgment of debt sent to it by the plaintiff meets all the essential elements of acknowledgment of liability

DEFENDANT'S CASE

Defendant prosecuted its case through the person of Ms. Joyce Kachale Ashby its surviving Director. Its witness denied confirming the loan when Plaintiff took instructions from the now deceased. Defendant's position was and still is that the loan is payable in ZWL\$ at the rate of 1:1 to US\$. Plaintiff offered to sell the witness the deceased's shares in Defendant in the same amount as the debt. That offer led to the drafting of an acknowledgment of debt which is before the Court by Plaintiff. In the email, she wrote to Plaintiff on behalf of Defendant in response to the draft acknowledgment of debt she disputed the amount claimed and raised other issues. The parties eventually failed to agree and the acknowledgment of

debt that was drafted by Plaintiff was never signed and never became effective and binding. The requirement for tacit acknowledgment of debt was not satisfied in this case. The email contents show that Defendant's conduct and the circumstances were not close to an unequivocal acceptance that the parties were beyond reasonable doubt satisfied that they agreed. The parties were still negotiating; a final figure was yet to be agreed on. There was no meeting of the minds between the parties, and as such there was no agreement to speak of. Plaintiff failed to prove the existence of an acknowledgment of the amount owed because Defendant's agents did not acknowledge the amount claimed in the summons. In the summons, the amount claimed is US\$16 149-42 whereas the amount in the acknowledgment of the debt draft is US\$16 100.00. Defendant's representative in her email said the amount must be corrected, therefore the amount claimed was not acknowledged, so Defendant argued.

THE EVIDENCE

The key clauses of the draft acknowledgment of debt are **1, 2, 3, and 11**. They read as follows:

“ACKNOWLEDGMENT OF DEBT

I, the undersigned **JOYCE KACHALE ASHBY**, (Identity Number:63-986794 M63) of 83 Harare Drive, Marlborough, Harare, being the representative of **JACARANDA REAL ESTATE (PRIVATE) LIMITED (the “debtor”)** do hereby acknowledge the following;

1. That the company is truly and lawfully indebted to **ESTATE LATE RICHARD ALWIN MATTEWS (the “creditor”)**, in the sum of **US\$16,100.00 (Sixteen Thousand One Hundred United States American Dollars)**, hereinafter referred to as “the capital sum” being a loan advanced to the debtor during the lifetime of Richard Alwin Matthews.
2. The debtor hereby binds itself to pay the debt in monthly instalments of **US\$500.00 (Five hundred United States Dollars)** with effect from the 23rd of April 2021, and thereafter on or before the 23rd day of each and every succeeding month until the debt has been paid in full.
3. 20% of the shares in Jacaranda Real Estate (Private) Limited to be transferred to the debtor after payment of the fourth instalment in terms of this acknowledgment of Debt, and the remaining 20% upon full and final payment of the capital sum.
11. This acknowledgment of debt constitutes the entire acknowledgment by the debtor in favour of the creditor and no warranties, representations or other terms and conditions of whatsoever nature not expressly recorded herein shall be of any force or effect.

Equally the key aspect of the Defendant's response to the Draft Acknowledgment of debt are the following;

“From Joyce Kachale <joycek@jaranda.co.zw?
Sent Tuesday, 20 April 2021 23.14
To Hellen Ndudzo

CC Beloved Dhakama
Subject RE: ACKNOWLEDGMENT OF DEBT- JACARANDA REAL ESTATE

Good evening Helen

Thanks for the attached draft.

Notes

1. Clause 1, Amount to be corrected. We are still to confirm total of sola, battery invertor system, safe, etc
2. Clause 2 Delays are being caused by waiting on information confirmation on clause 1. The sooner an agreement can be signed the sooner all can plan ahead and agree payment details.
3. Clause 3. I had discussed with Mr Dhlakama that the shares issue should be addressed in separate document unless they are to be used as security for any outstanding amount? Having the shares as a separate would avoid any confusion. If you could talk to him about it and get back to me?
9. Clause 11 Agreed and this is the reason that clause 1 needs to be corrected.

Regards

Joyce”

THE LAW.

Acknowledgment of debt requirements.

1. The acknowledgment of debt should be made by the debtor or his agent.
2. The acknowledgment of debt must be made expressly or tacitly acknowledging the existence of liability.
3. The acknowledgment of debt must be made to the creditor or his agent.

Peacock -v- Agricultural Finance Corporation 1995(2) ZLR 365(S), Mary Murdoch

Howson -v- John Alexander Cameron HH141/2018.

“It is necessary to prove by the preponderance of probabilities conduct and circumstances which are so unequivocal that the parties must have been satisfied beyond reasonable doubt that they agreed”.

Landmark Real Estate (Pty) Ltd -v- Brand, 1992 (3) SA 983, Mutomba t/a Mutomba Supermarket -v- R & C Investments (Pvt) Ltd, SC 85/02.

The law is therefore settled as regards the requirements of the acknowledgment of debt in this jurisdiction.

In this matter, there is no doubt at all that the draft acknowledgment of debt was all about the loan the now-deceased advanced to Defendant. **Clause 1**, states as much. Defendant’s representative in her email addresses **Clause 1** specifically. She does not raise any issues about the debt and/or defendant’s liability or currency or exchange rate save to say

the figure will be less the cost of the solar power installations done at the now deceased's house. In Note 2 of the email, Defendant's representative responds to the monthly instalment of US\$500-00 directly and bemoans the delay in the ascertainment of the exact figure after deducting the solar power installation cost. She raises no issue relating to the currency and/or exchange rate. Assuming there is a basis that the acknowledgment of debt was being confused with the sale of shares in one way or the other or Plaintiff was trying to dishonestly smuggle the shares sale issue into the document, that came to nothing or was sanitized by Defendant itself when in Note 3 its representative said they had discussed with Plaintiff that the issue of the shares be addressed in a separate document unless they are used as security and says in part thereto.

"Having the shares, as a separate (sic) would avoid any confusion"

The US\$ in 2021 April was back as a currency of trade in Zimbabwe. It is improbable that Defendant would get into the trouble of acknowledging a debt and negotiating a payment plan for a debt in the sum of ZWL\$16 100-00 and express fear that, it may fail to pay the total amount outstanding.

I found Defendant's witness to be an incredible witness. Most of her answers were evasive even on issues that were irrelevant or were not complicated or complex. A case in point is when she denied that she was called in to and did confirm the debt in question when Plaintiff was taking instructions from the now deceased person. That piece of evidence was irrelevant to the resolution of the issues that this Court was faced with. In my view, this was a strategy employed to feed into avoiding and denying that which was clear and unavoidable. I find it proven on a balance of probabilities that there was a meeting of the minds of the parties and there was an acknowledgment of debt in US\$, payable in US\$ by Defendant in 2021. The issue of the amount to be deducted from the figure, an aspect the parties were *ad idem* on, cannot, in my view, be said to have crumbled the clear acknowledgment of debt. Signing an acknowledgment of debt document is not a requirement although desirable. Payment of a contractual obligation that arose before February 2019 is not criminalized. As long as the parties agree to settle in US\$ the Court will give effect to that intention or agreement.

Breast Plate Services (Private) Limited -v- Cambria Africa PLC SC66/20.

DISPOSITION

Plaintiff has proven his case against Defendant on a balance of probability in this case. There was an acknowledgment of the debt by Defendant in 2021 and that the amount of the debt would be paid in US\$. It is therefore ordered as follows: -

IT IS HEREBY ORDERED THAT:

1. Judgment be and is hereby entered in favour of Plaintiff against Defendant.
2. Defendant shall pay Plaintiff the sum of US\$16 149-42 (Sixteen Thousand One Hundred and Forty-Nine United States of America Dollars and Forty-Two cents) or its equivalent amount in ZWL\$ at the prevailing foreign currency auction rate at the time of payment plus interest thereon at the prescribed rate from the date of service of summons to date of full and final payment.
3. Defendant shall pay Plaintiff's costs of this suit.

Dhlakama B. Attorney, Plaintiff's Legal Practitioners.

Takawira Law Chambers, Defendant's Legal Practitioners.

24 NOVEMBER 2022.