

S.C.  
130/83  
Judgment No. ~~S.C. 130/83~~ Civil  
Appeal No. 214/83

MARY JOSEPHINE BEUTH v LIONEL KEMPEN

SUPREME COURT OF ZIMBABWE,  
GEORGES, CJ, BECK, JA & GUBBAY JA,  
HARARE, NOVEMBER 7 & 21, 1983,

M.T. O'Meara, for the appellant A.P. de Bourbon, for the respondent

GUBBAY JA: The appellant instituted an action against the respondent in the High Court in which she claimed the return of a two carat solitaire diamond ring, or alternatively damages in the sum of \$10 500, being the value of the ring, less the sum of \$1 000 paid by the respondent in partial settlement of his liability to account to her in respect of the ring or the proceeds thereof.

The respondent, in his plea, admitted to possession of the ring but averred that on the night of 11 March 1982 it was stolen without any negligence on his part. He counter-claimed for repayment of the sum of \$1 000, together with interest thereon, alleging that such sum represented a loan made by him to the appellant.

The learned judge *a quo* (SANDURA J) dismissed the claim in convention with costs and on the claim in reconvention entered judgment in favour of the respondent in the sum of \$1 000 with interest and costs.

An appeal was noted against the whole of the judgment, but before it was due to be heard the challenge to the order made on the claim in convention was withdrawn.

This Court is concerned therefore solely with the issue of whether the respondent discharged the onus of establishing that the sum of \$1 000 was paid to the appellant as a loan.

It is necessary to sketch the circumstances which led to the respondent handing the appellant a cheque in the amount of \$1 000.

## **2. S.C. 130/83**

Towards the end of 1981 the appellant informed her accountant, a Mr Barabich, that she wished to sell her diamond ring. Such efforts as she had made to dispose of it herself had been unsuccessful. Barabich suggested that she approach the respondent, who was a client of his and a director of Coro Park Service Station (Private) Limited. This the appellant did. She informed the respondent that her reasons for selling the ring were twofold: to pay off the mortgage bond on her property, and to meet the cost of a visit to her granddaughter in the United Kingdom.

It was agreed that the respondent would seek a purchaser and if successful would charge the appellant a commission of 10% of the price obtained. Initially the respondent failed to find a buyer and the ring was put in the hands of a reputable jeweller who had better display facilities and more clients than the respondent. When he too failed to sell the ring the respondent again took possession of it.

After some time the respondent obtained an offer of \$10 500, the offer or to pay the commission on the sale. The appellant refused to accept that offer and the respondent, whose patience was by now wearing thin, returned the ring to her. A week later the appellant changed her mind but the respondent was not prepared to reapproach the offer or. He agreed, however, though with some reluctance, to seek another purchaser.

When the ring was brought back to the respondent it was placed in a safe (bricked into a cupboard) in one of the offices at the premises of Coro Park Service Station. During the night of 11 March 1982 the premises were broken into and the safe and its contents removed.

The appellant was informed the following morning of the calamity. She advised that the ring was uninsured, and in consequence it was decided that the respondent would present a claim for the value of the ring against his own insurers.

On 16 March 1982 the respondent was informed by an insurance assessor that only the property of Coro Park Service Station was covered under the policy of insurance. The loss of his personal property (including the ring) which had been in the safe would not be compensated for.

Some weeks after the theft the appellant approached Barabich. She intimated that she was in need of money in order to proceed on her planned visit overseas and requested that he contact the respondent to ascertain whether some arrangement for funds could be made.

This he did. In the event the appellant met with the respondent on 6 April

**3. S.C. 130/83**

1982 and received from him a cheque for \$1 000.

These background facts were common cause between the parties. What was in dispute was the basis upon which the money was paid to the appellant.

It was the respondent's evidence that when the appellant came to his office on 6 April 1982 he initiated the conversation by enquiring the reason why she was in need of financial assistance. She told him that she

was anxious to visit her granddaughter in the United Kingdom and that she had been relying entirely upon the proceeds from the sale of the ring to finance that trip.

He felt sympathy at her predicament and was somewhat embarrassed by it and so promptly agreed to help her.

He telephoned the offices of Air Zimbabwe and made a booking for her on a flight to London. He handed her a cheque for \$1 000 to cover both the cost of the airfare and incidental holiday expenses. He stressed that he was making her a loan and that on her return the matter would be further discussed. The appellant however left him with the impression that she regarded the payment as money owed her.

The respondent adamantly denied the suggestion that the payment was made to the appellant in part satisfaction of her claim for the loss of the ring. He asserted that had he considered himself liable for the loss of the ring there would have been no necessity what- so ever to meet such liability by installment payments

It was well within his reach financially to have paid the appellant there and then as much as \$12 000. He further denied making a gift of the money to the appellant.

The appellant testified that she approached the respondent for money because she considered him liable for the loss of the ring. As far as she was concerned, he owed her the money. On receipt of the cheque she made it clear to him that he was still indebted to her, His attitude was that the cheque was in full and final settlement of his liability to her. The word "loan" was never mentioned.

The learned judge in the Court below made no finding on the

**4. S.C. 130/83**

demeanour or credibility of either the appellant or the respondent. His approach was that it was one person's word against the other and he proceeded on the premise that the parties were equally credible.

Mr O'Meara, who appeared for the appellant, submitted that the respondent ought not to have been found a credible witness; he was uncertain and contradictory in his evidence as to the transaction involving the \$1 000 and he could not, as he claimed, still have believed at that time that his insurers would compensate him for the loss of the ring.

There was indeed some confusion in the respondent's mind as to the date when he handed the cheque to the appellant, but that criticism is not significant for it was common cause that the appellant received payment. Nor do I consider that a careful reading of the respondent's evidence shows that he vacillated with regard to the basis upon which the payment was made. In examination-in-chief he asserted that it was a loan and under cross-examination became even more insistent on the point. His professed belief that the claim was still capable of settlement with the insurers does not seem to me to be so fanciful as to be necessarily false. After all it was not only the appellant's ring that he was seeking redress for but his personal property as well. The relevant part of his evidence reads:-

"Q „ You testified earlier on that when you handed the cheque, over to Mrs Beuth you felt *sorry* for her but you also suggested to her that when she returned from her holiday perhaps the insurance matter sorted it and she would be paid? A. Yes, I did.

Q. Why did you suggest that when Mr Trigg (the insurance assessor) had already told you that you would not be able to obtain any redress in that respect? A. I didn't take Mr Trigg's word for law. I thought I could carry on with this due to the fact that he advised me too that the safe was not covered by insurance, only the contents and I said, well I don't know the law, I don't know any insurance, but this is ridiculous, how can it be, a safe has been removed, I am claiming on the safe and I am claiming on the contents of the safe. So I said to him you would better go back to Minet Insurance and advise them that if I don't have a claim on the safe, they can cancel my policy forthwith. So I was still waiting in abeyance to see if there was a possibility of presenting the claim on the stone."

In my opinion the learned judge a quo cannot be faulted for placing no reliance on the respective credibility of the litigants and for grounding his conclusion upon an examination of the probabilities alone.

In finding that the respondent had discharged the onus upon him the

**5. S.C. 130/83**

Court a quo referred to the following features: In the first place the ring had been stolen through no fault of the respondent: accordingly, it was unlikely that on the occasion he handed the appellant the cheque for \$1 000 he considered that he was personally liable to her for the value of the ring. Secondly, the respondent believed that there was some prospect of the appellant recovering the loss of the ring from his insurance company; in that belief it was unlikely that he would admit personal liability to her and make a partial settlement thereof. Thirdly, the fact that the appellant enlisted the intervention of Barabich to ascertain whether the respondent would be willing to provide her with financial assistance was rather more consistent with the seeking of a favour than with the attitude that payment was due in reduction of an obligation. There is also the feature that if the respondent had recognised an obligation to compensate the appellant for the loss of the ring, it is surprising that he should make merely an installment payment particularly one which was less than one-tenth of the value of the ring. It was well within his means to have made payment to her in full.

Mr O'Meara submitted that an improbability arising out of the respondent's version was that if the transaction had been an agreement of loan some arrangement would have been made as to a time for repayment Viewed out of the context of the situation and the relationship between the parties there would be merit in this submission. But it must be remembered that the respondent claimed that he was understanding of the appellant's dilemma and felt a moral obligation to render assistance, especially as a major asset she had entrusted to his care had been stolen. Against that setting I do not think it incongruous that the matter of repayment was not discussed. To have raised it would have been somewhat indelicate. The respondent contented himself by indicating to the appellant that "other matters" would be finalised on her return.

It was further urged by Mr O'Meara that if the money had been lent it is improbable that the respondent would have taken no steps to recover the amount until the receipt of a letter from the appellant's legal practitioners demanding payment of the value of the ring. The letter written on the appellant's behalf is dated 4 May 1982. She departed for overseas two days later. On 14 May 1982 the respondent's legal practitioners replied denying liability and claiming repayment of the sum of

\$1 000 said to be a loan. It is apparent therefore that the respondent reacted consistently with his testimony that the money had been advanced as a loan to the appellant. There was no call to make a demand for repayment before receipt of the appellant's letter because, as I have mentioned, the matter was to be left in abeyance until her return from overseas.

~~Initially~~ I was attracted by the thought that the respondent had made an ex gratia payment to the appellant. Having listened to the arguments, I am satisfied that is not a tenable conclusion for neither version lends itself to it. The appellant adamantly contended that she received the money as part payment of a recognised liability. The respondent was equally insistent that he was not indebted to the appellant for the theft of the ring and that as a favour to her he had agreed to lend her the \$1 000.

The issue therefore was simply whether the respondent's version of the transaction was proved the more probable of the two. I have already adverted to the probabilities to which the learned judge a quo had regard. I agree with him that they fall heavily on the respondent's side. In my opinion he was correct in his appraisal of them, to which there was no effective counter. Accordingly the respondent established that the payment of the \$1 000 was a loan.

It follows that the appeal must be dismissed with costs,

GEORGES CJ: I agree,

BECK JA: I .agree.

Winterton, Holmes & Hill, appellant's legal representatives. Stumbles & Rowe, respondent's legal representatives.