

Civil Appeal No 176/01

ALLAN LAURENCE BANKS v NERINO OLIVEIRO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
HARARE MAY 3, 2004

R.M. Fitches, for the appellant

S. Mushonga, for the respondent

CHIDYAUSIKU CJ: At the conclusion of submissions by counsel we dismissed the appeal and indicated that the reasons for judgment would follow. The following are the reasons for judgment.

The facts of this case are fairly simple and straight-forward. They are briefly summarised in the judgment of the court *a quo* as follows. The respondent, (the plaintiff in the court *a quo*), and hereinafter referred to as the plaintiff, issued summons against the appellant (the defendant in the court *a quo*), and hereinafter referred to as the defendant. In the summons the plaintiff claimed \$500,000.00 allegedly due in terms of an acknowledgement of debt signed by both parties. The defendant requested further particulars and received the response that the amount of \$500,00.00 claimed to be due, did not strictly represent a loan, but

represented an amount due over and above that reflected in an agreement of sale of immovable property entered into between the two parties. Thereafter, the defendant requested a copy of the agreement of sale and there ensued a series of correspondence in regard to the matter.

Subsequently, the further particulars supplied were in the form of a copy of the agreement of sale to the effect that the sum of \$500,000.00 formed part of the purchase price in the agreement for the sale of shares entered into between the parties on 20 June 1991. The purchase price of the shares, it was alleged, was in the amount of \$2,45 million. The defendant excepted to the claim on the principal ground that it was inconsistent and was contradictory, particularly in that the amount due represented part of the purchase price of immovable property and that it also represented the amount in terms of an agreement for the sale shares.

The plaintiff responded by amending the claim by the deletion of the averment that the amount due arose out of an agreement of the sale of the immovable property.

The learned judge in the court *a quo* was of the view that the amendment cured the ambiguity and left intact the averment that the amount of \$500,000.00 represented an amount above the sale price for the purchase of shares reflected in the agreement between the parties. The court *a quo* thereafter dismissed the exception on the basis that the amendment had removed the cause of complaint. The defendant was aggrieved by this judgment and appealed to this Court.

The grounds of appeal are set out in the notice of appeal which reads as

follows:-

- “1. The court *a quo* erred in dismissing the exception of the basis of the amendment filed on 4th February 1998, as this amendment did not remove the inconsistent averments in the Declaration which continued to be vague and embarrassing to the defendant in that he was still unable to ascertain the case he had to meet, by reason of the inconsistencies.
2. The court *a quo* erred in dismissing the defendant’s exception as the plaintiff’s declaration still contains inconsistent averments as to whether the plaintiff’s cause of action is a loan secured by an Acknowledgement of Debt, or whether it is for payment of the balance of a purchase price of a sale of shares.
3. The court *a quo* erred in not upholding the exception, as, despite the plaintiff’s amendment aforesaid, the plaintiff’s claim, as particularised, is still vague and embarrassing as it purports to rely on a loan, then avers that the transaction was not a loan, then avers that no monies were advanced, then avers that the sum claimed represented not part of the purchase price of immovable property, but represents an additional amount, without particularising this to enable the defendant to know the case he has to answer.
4. The court *a quo* erred in not upholding the defendant’s exception as, despite the plaintiff’s purported amendment, the claim was still vague as to whether it related to the purchase of shares or to the purchase of immovable property.”

I agree with the learned judge in the court *a quo* that the amendment removes the cause for complaint. In any event it is quite apparent from the pleadings that the plaintiff is suing the defendant on the basis of a liquid document signed by the defendant. The plaintiff could simply have proceeded by way of application for a provisional sentence had he so elected. The defendant is not impugning the liquid document. The demand for particulars when the defendant’s

signature appears on the liquid document is a red herring. The defendant must know why he signed the acknowledgement of debt and seeking to get the plaintiff to tell him why he signed the acknowledgement of debt is facetious.

In the result I am satisfied that the appeal should be dismissed with costs.

CHEDA JA: I agree

MALABA JA: I agree

Jerome O'Brien, appellant's legal practitioners
Mushonga & Associates, respondent's legal practitioners