

GORDEN MUTSAMBA
versus
MRS E. DUBE

HIGH COURT OF ZIMBABWE
KAMOCHA AND MOYO JJ
BULAWAYO 20 JULY AND 1 OCTOBER 2015

Civil Appeal

A. Mhaka for the appellant
N. Mlala for the respondent

MOYO J: The appellant in this matter was ordered by the magistrates court sitting in Bulawayo to pay to the respondent a sum of \$5670-00 being a loan advanced to him by respondent on 4 September 2012.

He was also ordered to pay interest on this sum and costs of suit. Dissatisfied with this order the appellant then approached this court.

The respondent's case in the court *a quo* was that the appellant on 4 July 2012 borrowed from her a sum of \$5760-00 which was a loan payable on 4 September 2012. The appellant then allegedly failed or neglected to pay the money in question.

A written memorandum of agreement was signed between the appellant and the respondent. The appellant's defence was that the respondent had been for a long time doing business with the appellant's son, one Admire Mutsamba and that his son who was a businessman running a butchery was away at the relevant time and that he asked him (the appellant) to go and collect US\$4000-00 from the respondent which he did and that he was made to sign a document which he did not care much about as he understood it to mean that he was signing for the receipt of the money for onward transmission to Admire Mutsamba (his son). He averred that he never borrowed the funds nor received the money in his personal capacity, but that at all times he acted as an agent for his son Admire Mutsamba who had previously been loaned monies by the respondent. He even told the court that he did bank the \$4000-00 into

Admire's Bank account as per his son's instructions. His evidence was that Admire even later communicated with respondent and acknowledged his indebtedness as well as made promises to pay. He also stated that even respondent, when pursuing the money through text messages, did not demand the money from him but asked him to persuade his son to pay as failure to pay would create problems between her and her husband.

Appellant stated that problems started when Admire Mutsamba then disappeared and went to the Republic of South Africa without making good the payment. He stated that is when respondent decided to gun for him instead pretending that he had actually borrowed the money and not Admire Mutsamba who could not be found. The respondent in the court *a quo* disputed appellant's version of events and in fact denied ever dealing with Admire Mutsamba and that according to her she lent the money to respondent and the deal had nothing to do with Admire Mutsamba at all.

A look at the court record would reveal the following facts:

- 1) A question was put to the respondent whether he knew Admire Mutsamba and how he knew him and her answer was:

"It is the respondent's son who also owed me money. But he had sneaked to South Africa."

- 2) Under cross-examination she was asked the following question:

Q: When you gave him that amount did you know Admire Mutsamba?

A: I have heard of him but had not met him in person.

Q: Is it not correct that the defendant merely collected money from you for Admire Mutsamba?

A: I do not know, but if he took the money intending to give it to his son that is a different issue.

Q: Did you know that Admire Mutsamba was operating a business/butchery called Kingdom Meats?

A: My friend advised me as she was doing business with him.

She was shown a document that she had signed between herself and Admire Mutsamba as at 18 May 2012 and she was asked:

Q: The document is dated 18 May 2012, did you know Admire Mutsamba?

A: Yes, through my friend who was in partnership with Admire Mutsamba.

Q: You indicated earlier that you did not know Admire Mutsamba.

A: I knew him through a friend who did business with him.

She said all the agreements she had signed with Admire Mutsamba were on behalf of a friend and she never gave Admire Mutsamba any money.

The respondent initially distanced herself from having dealt with Admire at all, then when agreements were tendered in court to prove that she used to lend Admire some monies as per defendant's testimony, she then tried to distance herself from the agreements by saying she did not know much about them but only did them on behalf of a friend who was in the United Kingdom yet the agreements depicted her as the lender and not her friend in the United Kingdom.

The appellant also produced text messages in court in a bid to prove that the respondent had indeed loaned the money to his son and not him and that he only signed as the receiver not as the borrower although the document depicted him as the borrower. The text messages are as follows:

"How are you father. I am requesting that you see to it that the young man has raised the whole amount and to give me on the 4th as per agreement. Because extension (*sic*) that I made has created problems with my husband."

Another message read:

"How are you father, since 2 weeks is left, encourage the young man to raise the money so that on the 4th I would get the whole amount. I gave him a huge sum because I trusted you. I want to use it.

Thank you."

Another message read:

"Mr Mutsamba assist your child to raise that time. (*sic*) He sent me a text message that we discuss but discuss cannot be done or else my marriage may be destroyed." (*sic*)

These text messages show that in fact the respondent lent the appellant's son monies and she was trying to get him to urge his son to pay back as her marriage relationship would be in trouble if no payment was received.

Whilst the court has to read the document between appellant and respondent for what it is, that is, a loan agreement between the two of them as per the caveat subscriptor rule, that is to

the effect that a party is bound by the terms and conditions of a contract that he has signed, and while the parole evidence rule, demands that courts should not look for extrinsic evidence where parties have a written contract, in my view the law of contract has rightly provided exceptions to these rules of interpreting contracts so that, the court's interpretation of same would not result in an injustice. Certainly justice must be done between man and man and it would not be just that the court is used to enforce a contract that is clearly false or one which is a misrepresentation of the true facts of the matter.

Clearly from the facts of this matter, the appellant, although he was negligent in not checking the agreement that he signed, he did not expect that respondent would deliberately misrepresent facts therein, he had been sent by his son to collect funds from respondent and he trusted that the document he was signing was about that and nothing else.

The respondent clearly acted in bad faith in drawing a document that from the facts of the matter as they unfolded in the court *a quo*, was not in accordance with what the parties had discussed and agreed on. Respondent acted fraudulently in my view and she took advantage of the appellant's trust and naivety.

In terms of the rule of caveat subscriptor, a party who signs a document is bound by his or her signature whether he or she read the document or not.

The rule, however is not absolute. It comes down to the question of whether the party who signed the document created the impression for the other party that he or she had agreed to the terms contained in the document. By applying this test the law gives effect to the principle that a person signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature, while at the same time, protecting such a person if he is under a justifiable misapprehension, caused by the other party who requires such signature, as to the effect of the document. Refer to the case of *Absa Bank Ltd v McCreate* ZA ECG HC 51/14 (South African case). There are therefore instances where liability based on one's signature can be avoided within the realm of mistake and a signatory who has signed a document without knowing or understanding all the terms of the document may be relieved from the contract. Refer to the case of *George v Fairmead Pty Ltd* 1958 (2) SA 465.

I accordingly find that on the facts, clearly the appellant went to collect the money on behalf of his son and signed the document to acknowledge receipt of the sum he received. It was

therefore dishonest of the respondent to take advantage of the appellant's trust and naivety and instead coin a document that did not depict a true picture of what had transpired between the parties. Compelling the appellant to honour an agreement that he clearly did not enter into in the first place, but for respondent's attempts to deceive him, would be to allow an unjust result to prevail. I will allow the appeal with costs at an attorney and client scale for the simple reason that the respondent has been very crafty and untruthful as she has sought to benefit from her clear dishonesty. The court should frown at such conduct by litigants and register its displeasure through an order of punitive costs.

I therefore make the following order:

- 1) The appeal is allowed.
- 2) The judgment of the court *a quo* is set aside.
- 3) The respondent is ordered to pay costs at an attorney and client scale.

Kamocha J agrees.....

Mhaka attorneys ' appellant's legal practitioners
Sansole and Senda, respondent's legal practitioners