

STANBIC BANK ZIMBABWE LIMITED
versus
COSMAS M. KANDEYA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 19 and 20 March 2014, 16 and 17 June 2014
and 20 August 2014

Trial

Adv T.Mpofu, for the plaintiff
T.T.G. Musarurwa, for the defendant

MTSHIYA J: On the basis of an existing acknowledgement of debt, the plaintiff claims

- “a) Payment of the sum of US\$74 4480-00.
- b) Penalty interest thereon at the rate of 20% above the prime lending rate charged by the plaintiff bank being 17.85% per annum from the date of summons to date of payment in full;
- c) Costs on the legal practitioner and client scale.”

The background to the above claim is well captured in detail in the defendant’s plea and for the sake of clarity, I cannot help but repeat it herein in full.

The said background, as given by the defendant himself is as follows:

- “1. Defendant was employed by plaintiff as from sometime in 2005 to October 2011 when he was dismissed for contravening section 11 (1) Appendix IV of the Collective bargaining Agreement: Banking Undertaking Statutory Instrument 273 of 2000 which is any act, conduct or omission inconsistent with the fulfillment of the express or implied conditions of his contract where such is not provided for under Category “A”, “B” or “C” in that he facilitated and created a new mandate file which had various discrepancies against Ringwood Investemrns Account 0222055500201 which resulted in a fraud of US\$74,480 by Raju Tavrnton and Ali Lala Kassim.
2. When this fraud occurred the defendant was employed by the plaintiff as a Know Your Customer (KYC) Clerk. His duties in this regard involved updating customer records and making sure that such records complied with the KYC requirements of the plaintiff as provided for by the Reserve Bank of Zimbabwe. His duties include ensuring customers comply with the Know Your Customer

(KYC) requirements. Such requirements are meant to ensure that the Bank has a proper knowledge of its customers, their business and their financial transactions.

3. The account in question belonging to Ringwood Investments Private Limited was not KYC compliant and as such a debit posting prohibition had been placed in the system to alert the teller to refer the owner of the account to the defendant.
4. Sometime in early January a gentleman by the name of Raju Brad Tavrnton came to the bank and introduced himself as the owner of the Ringwood account.
5. The identification card of Raju Brad Tavrnton matched the particulars that were in the system. As such the defendant gave this gentleman a mandate form to fill out and a list of the account opening requirements.
6. The original mandate file for Ringwood had always been missing and this appears in his reports to his supervisor and to the Branch Manager. It is for this reason that the 'directors' were told to bring in new documents so that a new mandate file could be opened.
7. On 14 January 2011 Raju Tavrnton returned with the requirements except for the ID and Proof of Residence for the other director claiming that such director was in London at that time. With this in place the debit prohibition order was removed to allow the client to access 'his' funds.
8. The defendant verified the signature of the 'fraudster' based on the mandate file that he had compiled as consistent with his duties as a KYC Officer/Business banker. The signature on the withdrawal slips matched the signature on the specimen signature section of the mandate from that the client had brought in.
9. During the KYC process the Bank was accepting copies, faxed copies, and scanned copies of company documents and it was not necessary to have sight of original documents. The Bank was also accepting expired tax clearance certificated and even any form of communication between a company and ZIMRA was acceptable as tax clearance.
10. As a business banker the defendant had the discretion to allow an account to transact without all the KYC documents of the directors of the company should commitment to bring the remaining documents. As such the defendant allowed the Ringwood account to transact. The documents for the other director were, however, brought to the bank as promised and the account became KYC compliant.
11. The defendant gave clearance for the account to transact and on 14 January 2011 Raju Brad Tavrnton withdrew US\$10,00. The following day he then withdrew US\$50,000. ON 2 February 2011 he withdrew US\$10,000 and on 3 March 2011 he withdrew US\$4,000. All these transactions were made at the plaintiff's Parklane Branch. On 14 March 2011 he withdrew US\$480 from the Borrowdale Branch.
12. The fraud only came to light when the actual account owner sent an email to the Bank Manager requesting a bank statement where he then queried the abovementioned transactions.
13. On 11 May 2011 the defendant was apprehended by the plaintiff's internal investigation team which included some former Zimbabwe Republic Police officers. They took him to their offices in the morning and only began interviewing him towards the close of business.

14. He explained to them his involvement in the matter and he denied ever conniving with the fraudster responsible for the fraud. No link could be established between the defendant or the money that had been defrauded. The defendant was assaulted with fists in his stomach for his denials.

15. With this assault the defendant first signed a handwritten statement where he said the Bank can sell a house that is in his name if they fail to find the fraudster. When it was discovered that this statement had little legal authority he was made to sign an acknowledgement of debt that had been hastily drafted by the plaintiff's legal department. It is this document that the plaintiff now bases its claim.

16. The defendant denies owing the plaintiff any money and believes any claim for loss of this money should be directed to the actual fraudster and not to him. The plaintiff should base its claim on proof that the defendant was responsible for this loss in funds and not on a fraudulent acknowledgement of debt that was signed under duress."

As already indicated in the above detailed background information, the defendant denies the claim mainly on the ground that the acknowledgement of debt was signed under duress.

Indeed the Joint Pre-Trial Conference minute filed on 11 February 2013 lists the issues for determination as:-

- "1. Whether or not the Acknowledgment of Debt signed by the defendant in favour of the plaintiff was signed freely or voluntarily.
2. Whether or not the defendant is liable to the plaintiff based on the said acknowledgement of debt."

On the basis of the above issues, I shall proceed on the understanding that the defendant's exception filed on 6 September 2011 was abandoned. The exception was also not argued in the closing submissions.

I believe that a determination of the above two issues, either way, disposes of this action. In determining the issues I shall be guided by the fact that the contents of the existing acknowledgement of debt were not challenged. The defendant's defence was that he signed the document under duress.

Three witnesses testified during the trial. The plaintiff called Continue Mudekwa (Mudekwa) as its only witness. The defendant and his mother, Beatrice Chipo (Chatapura) (Chatapura) testified.

Mudekwa gave a narration of how investigations were carried out and how the acknowledgement of debt was signed. He said the plaintiff had indeed suspected the

defendant of having been involved on the loss of the plaintiff's funds. The defendant, he said, had agreed that, were it not of his negligence in the performance of his duties, the plaintiff would not have lost its money. He denied that he and his colleague, Stanley Shaninga, (Shaniga) had assaulted the defendant. It was his evidence that the defendant had freely and voluntarily signed the acknowledgment of debt. Mudekwa said the defendant had free telephonic communication with the outside world during the interview.

The defendant's testimony was to the effect that he was not involved in the fraud and that the investigating officers had through threats and assault forced him to sign the acknowledgement of debt. He said Shaniga had punched him twice in the stomach. He went further to say he had been threatened with losing his job and being locked up in prison.

The defendant's mother, Chatapura, said she had witnessed Shaniga actually assaulting the defendant who was then bleeding through the mouth and nose. She said although the property referred to in the acknowledgement of debt was registered in the defendant's name, it was actually hers.

In determining this case, one must not lose sight of the fact that the claim is solely based on an existing acknowledgement of debt. The acknowledgement of debt was anchored on the fact that the defendant, had, through negligence of his duties, caused the plaintiff to suffer financial loss.

In his handwritten note, submitted as part of exhibit 1, the defendant states, in part;

"I was negligent in conducting my duties which in turn has costed the bank. As such I have offered to cede Title Deed to my property whilst the bank conducts its investigations. This, I have done voluntarily without any undue pressure or influence from any one."

The above declaration by the defendant forms the basis of the formal acknowledgement of debt which the defendant then signed on the same date i.e 11 May 2005. There is no suggestion that the defendant admitted to committing fraud. The defendant only admitted that due to his negligence the bank had lost money, which money the bank was entitled to recover from him. The defendant's own narration of events in the background information reveals that it was in his discretion to authorize the

huge payouts. He admitted that an embargo (prohibition) had been placed on the account since it was not KYC compliant. He had, using his discretion, removed the prohibition. His subordinates had relied on him for the authorization of transactions.

To that end the plaintiff dismissed the allegation of duress and in support of its position it cited the case of *Steiger v Union Government* (1919) where it was stated as follows:

“Force and fear will annul an agreement when the fear is not vain or foolish, but such as to overcome a mind of ordinary firmness. The true ground of the annulment is extortion through the influence of fear induced in various ways and it is really a question for the court or jury whether in all the circumstances the consent was in fact extorted by coercion. It is therefore very necessary that the material circumstances giving rise to the fear should be clearly and distinctly averred. As *de Villiers CJ* said in the leading case of **White Brothers v Treasurer General B (2 Juta, at p 350)**.

‘It is clear from what has been said by him (i.e. Voet) and other Dutch writers on this point, that it is the want of free consent on the part of the person entering into the contract or making the payments which lies at the root of the rule which invalidates contracts or payment extorted by the force or intimidation’”.

The circumstances *in casu* do not, in my view, reveal force and intimidation.

There is no direct link between the acknowledgement of debt and the criminal charges in exh 2. What therefore has to be established *in casu* is whether or not the defendant voluntarily accepted liability due to his own negligence. The basis of his acceptance of liability is that the losses were due to him having authorized the release of funds. He admitted that without his authority the transactions would not have gone through. The investigation by the plaintiff’s officers did not establish fraud but negligence as admitted by the defendant.

In his closing submissions the defendant properly lays out the grounds upon which the acknowledgement of debt can be rejected on the ground of duress. These are listed as follows:

- “g. Actual violence or reasonable fear.
- h. The fear must be caused by the threat of some harm to the party.
- i. The threat or intimidation must be unlawful or unjustified or *contra bonos mores*.
- j. The threat must be of an immediate or imminent harm or evil; and

k. The pressure or means used must have resulted in prejudice or damage of some kind – *Broadry v Smuts NO supra*, at page 52 and RH Christie ‘*The Law of Contract in South Africa*’, at page 368-377.”

In considering the above factors, one must take into account the fact that the defendant is an educated mature adult, who is mentally sound. At the material time he had :-

- a) 10 ‘O’ levels
- b) 3 ‘A’ levels
- c) Certificate in Banking; and
- d) Certificate in Treasury Management.

Given his above attributes, one wants to believe that throughout the investigations he understood what was happening. He also later enjoyed the support/ advice of at least two legal practitioners.

It was not denied that the assault allegations only became an issue when the plaintiff sought to enforce the acknowledgement of debt.

Furthermore, the defendant confirmed that he was allowed to effect amendments to his handwritten document. Such a process is not consistent with a situation where one is forced to sign a document whose contents he or she disagrees with. The defendant also confirmed that he volunteered the particulars of his property to the investigators. The property was indeed registered in his name.

It must have been obvious to him that if he was not only negligent but was also involved in the fraud, the police would be involved. There is nothing unusual about that.

I therefore do not see how the investigators would have avoided telling him that. This was an investigation of fraud where the defendant admitted that, were it not of his negligence, the fraud would not have occurred. I therefore do not accept the allegation of intimidation.

The allegation of assault gets clouded when one considers the defendant’s mother’s evidence. Chatapura told the court that she actually saw the defendant being assaulted and bleeding through the mouth and nose. There was no such testimony from the defendant who was supposed to be the victim. Assuming that her evidence was truthful, surely a report to the police, supported by a blood stained shirt, would have left

us in no doubt that Mudekwa and Shaninga assaulted the defendant. There was no such report from both the defendant and his mother.

Chatapura further went on to say the defendant had received kicks to his genitals. That again was never mentioned by the defendant himself. That must have been false evidence.

Praying for Chatapura's evidence to be totally ignored, the plaintiff referred to the case of *Leader Tread Zimbabwe (Pvt) Ltd v Smith* HH 131/03 where NDOU J:

“It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all – see *Tumahole Bereng v R* [1949] AC 253 and *South African Law of Evidence* by L.H Hoffmann and D T Zeffertt (3ed) at page 472. If a litigant lies about a particular incident, the court may interfere that there is something about it which he wishes to hide”

Indeed, the defendant, through his mother, gives the court the clear impression that the truth is being hidden. The two gave completely different versions of how the investigators handled the defendant. I do not want to believe that the defendant could have forgotten that he was assaulted to the extent of bleeding through the nose and mouth. Mudekwa's version of events is therefore credible.

My conclusion is that the defendant was never assaulted, intimidated or threatened. That being the case the defendant has failed to prove that he was coerced to sign the acknowledgement of debt. The defendant freely acknowledged that the loss to the plaintiff was due to his negligence and hence his willingness to make good through the sale of his property whose value, for some reasons, almost matched the plaintiff's loss.

The plaintiff's claim must therefore succeed.

IT IS ORDERED THAT:-

1. The defendant pays the plaintiff the sum of US\$74 480-00, plus penalty interest thereon at the rate of 20% above the prime lending rate charged by the plaintiff from the date of summons to the date of payment in full; and
2. The defendant pays costs of suit on a legal practitioner and client scale.

Messrs Mawere & Sibanda, plaintiff's legal practitioners
Messrs Mambosasa, respondent's legal practitioners