

NMB BANK LIMITED
versus
POTRID INVESTMENTS (PVT) LTD
and
COSTER MAISIRI
and
TREVOR MUPAMHADZI
and
JACQUELINE CHIPARAUSHE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 18, 21, 23 October 2014 & 6, 11, 26 November 2014

Trial

Ms D. Ndawana, for the plaintiff
O.T.Gasva, for the 2nd defendant

MTSHIYA J: On 29 November 2010 the plaintiff issued summons against first, second, third and fourth defendants for the following relief:

- “A. Payment of US\$31,351.91 with interest thereon at the rate of 60% per annum from the 1st of November 2010 to date of payment in full.
- B. A declaratur that the property known as a certain piece of land situate in the district of Salisbury called Stand 2300 Glen View Township of Glen View, measuring 200 square metres Reg No. 14567/2002 is executable
- C. Costs of suit on the legal practitioner and client scale.”

The background to the plaintiff’s claim is that under a facility letter dated 2 April 2009, the plaintiff advanced a loan of US\$30 000-00 (Thirty Thousand United State Dollars) to the first defendant (the facility). The loan was secured by a mortgage bond registered over the immovable property of the second defendant, namely a certain piece of land situated in the district of Salisbury called Stand 2300 Glenview Township of Glenview, measuring 200 square metres, registration number 14567/2002 (the property). Prior to the above facility, the plaintiff had granted three other facilities to the first

defendant in Zimbabwe dollars. These were granted on 27 August 2008, 17 September 2008 and 15 October, 2008, respectively.

Apart from noting that in all the earlier facilities the second defendant's property was "proposed" as security, the said earlier facilities are not the subject of these proceedings.

The loan advanced under the facility letter dated 2 April 2009 is the one that is still outstanding and hence the issuance of summons by the plaintiff on 29 November, 2010.

On 7 January 2011, through Messrs Gunje & Chasakara Law Firm, all defendants entered appearance to defend. All defendants proceeded to file their joint plea on 23 September 2011, to which the plaintiff replicated on 23 January 2012.

For some unexplained reason, I notice from the record, that on 20 March 2012 the second defendant herein separately filed another notice of appearance to defend. That notice of appearance to defend was followed by another separate plea on 22 March 2012. The second plea, it appears, forms the basis of the second defendant's defence in this action. The plea constitutes a total denial of any knowledge of the first and third defendants' business transactions.

On 1 June 2012 the first, third and fourth defendants defaulted in attending a pre-trial conference, leading to their defences being struck out. The papers indicate that a default judgment was subsequently granted against them. It is therefore only the second defendant who is defending this action, mainly on the ground that he never consented to the use of his property as security for the loan advanced to the first defendant and was never aware of the business dealings between the first and third defendants.

Indeed at the Pre-Trial Conference, the issues for determination were identified as:-

1. Whether or not the second defendant consented that his property known as a certain piece of land situated in the district of Salisbury called stand 2300 Glen View Township of Glen View, measuring 200 square metres Reg No.14567/2002 be used as collateral security by the 1st, 3rd and 4th defendants.
2. Whether or not the second defendant signed any deed of suretyship or power of attorney for the registration of a surety mortgage bond on his property."

The plaintiff, in addition to documentary evidence, which included six exhibits, called two witnesses, namely Webster Nyamuripa (Nyamuripa) and Farai Nyambiya (Nyambiya).

Nyambiya, who is employed by the plaintiff as the Account Manager, testified that he was responsible for the first defendant's account and had processed its facility. He said the second defendant, whom he knew from secondary school days, had been brought to his office in August 2008 by the third defendant. The third defendant had approached the plaintiff for a loan on behalf of the first defendant. The third defendant was a Director in first defendant. He said it was at the August meeting that the second defendant had consented to his property being used as security for the facility. Nyambiya said upon explaining the implications behind registering a mortgage bond over his property, the second defendant had then surrendered his title deeds. Subsequent to the surrender of the title deeds, a power of attorney and affidavit, both signed by the second defendant, were submitted to the plaintiff. The mortgage bond was then registered. Nyambiya believed that the second defendant had not claimed his title deeds back earlier because he was fully aware that the loan had not yet been repaid.

Through Nyambiya, the plaintiff submitted the following documentary evidence.

1. Plaintiff's Bundle of Documents (Exhibit 1) incorporating facilities, mortgage bond, power of attorney acknowledgement of Debt and letter from the second defendant dated March 2012.
2. Copy of Title Deeds (Exhibit 2)
3. Proposed Mortgage Bond (Exhibit 3) ; and
4. Affidavit by 2nd defendant (Exhibit 4).

The plaintiff's second witness, Nyamuripa, said he is the Assistant Manager responsible for recoveries. He said upon being advised that the defendants were in default, he had handed the matter over to the plaintiff's legal practitioners. He said the second defendant had approached him inquiring about the outstanding loan. He had taken the view that the second defendant wanted to settle the matter. He said the plaintiff would have welcomed a settlement. To that end he had asked the second defendant to write to the plaintiff indicating what he proposed to do. That had resulted in the second defendant writing the following letter to the plaintiff in March 2012:-

“House No.2300
36 Cresecnt
Glen View 1

March 2012.

Mr W. Nyamuripa
NMB Bank
Harare, Zimbabwe

Dear, Sir

I, Coster Maisiri, the current owner of the above mentioned property which was used as a security to secure a loan of US\$30 000 (thirty thousand dollars) by Trevor Mupamhadzi who is the director of POTRID CLOTHING MANUFACTURERS (PVT) LTD, do hereby state that I was misinformed by Mr Mupamhadzi. He lied to me that he wanted to secure a loan so that he will import the raw materials and will pay back the loan in six months' time as from May 2009. After securing the money Trevor bought luxury vehicle and the money was not used for the intended purpose. The loan was never paid back and Mr Mupamhidzi is on the run.

I therefore take this as fraud on my part and I have reported the case to police (Avondale Police) who are handling the case. I am in the process of bringing him to justice and for him to pay back the loan.

Thank you for your cooperation.
0773 178 882- Coster Maisiri.”

The witness said he did not in any way influence the contents of the above letter which was brought to him the following day.

Before the plaintiff closed its case, the following exhibits were handed in by consent of both parties;

1. Picture of Nyambiya's office (Exhibit 5), and
2. Letter from Chirimuuta & Associates dated 7 March 2013 (Exhibit 6).

The second defendant, who is a major in the Zimbabwe National Army, gave evidence on his behalf. Initially, his was a total denial of ever having been associated with the business transactions of the first and third defendants. He denied having authorized the third defendant to use his property as security for the loan.

However, notwithstanding earlier denials relating to the signing of the power of attorney and affidavit, acts which lead to the registration of the mortgage bond, at the end of his evidence the second defendant associated himself with the contents of his letter

quoted herein in full at pages 3-4. The second defendant's confirmation that he wrote the letter of March 2012 and his acceptance of the contents therein, led to the following submission by the plaintiff:-

- “59. It was the 2nd defendant's evidence that after being “advised” to write the letter he went home wrote the letter and only took it to the plaintiff's legal practitioners' office the following day. He further testified that even whilst he was submitting the letter, the plaintiff's legal practitioners had indicated that his property would be sold and he still left the letter with the plaintiff's legal practitioners. The only reason why the 2nd defendant would not have demanded for the return of the letter was that the contents of the letter were the truth.
60. Even in examination by the court, the 2nd defendant agreed that when he received the advice from Mr Nyamuripa he wrote the letter because he was in agreement with the advice. That ought to be the end of the matter. The 2nd defendant admitted that he agreed to the registration of the mortgage bond over his immovable property and he had only been deceived with regard to the use of the funds not whether or not the mortgage bond ought to be registered.”

I fully agree with the above submissions by the plaintiff.

Both parties are agreed that once the defendant's consent for the registration of the mortgage bond over his property is established, then the dispute is settled. In other words, the establishment of consent on the part of the second defendant, disposes of the two issues placed before the court for determination.

My assessment of the second defendant's evidence is that, in a bid to save his property, he deemed it necessary to create a new story. He, however, discovered towards the end of the trial that his story could not destroy the truth. That led him to abandoning the need to call a handwriting expert witness and also to finally confirm that his letter of March 2012 represented the truth in this matter. That truth was indeed in line with his admission that the signatures on the power of attorney and affidavit are similar to his.

Having agreed that this property was indeed used by the third defendant for the loan granted to the first defendant, the second defendant then says:-

“I ----- do hereby state that I was misinformed by Mr Mupamhadzi. He lied to me that he wanted to secure a loan so that he will import the law material and will pay back the loan in six months time as from May 2009. After securing the money Trevor bought luxury vehicle and the money was not used for the intended purpose. The loan has never been paid back and Mr Mupamhadzi is on the run.”

The above, having been confirmed to have been freely written by the second defendant, does not constitute a denial that the title deeds were delivered to the plaintiff. It is also not a denial of authorship of instruments that enabled the registration of the mortgage bond (i.e. power of attorney and requisite affidavits). All it says is that, had he not been misinformed by Mupamhadzi, he would not have consented to the use of his property being used as security for the loan. However, because of what he now regards as misinformation, he nevertheless consented to his property being used as security.

The above evidence helps the court to quickly discard the earlier lies by the second defendant and accept the plaintiff's untainted story. The plaintiff's story, supported by documentary evidence, was told through witnesses whose credibility was not questionable. Given such evidence, which in my view, is finally confirmed by the second defendant himself, everything points to the need for this court to grant the relief prayed for by the plaintiff.

Apart from saying that he did not think the second defendant fully associated himself with the contents of his own letter of March 2012, the second defendant's counsel did not comment further on the evidence of the second defendant. I hold the view that the second defendant had ample time to reflect on the contents of his letter. If he did not fully agree with the contents of the letter, he would have said so or could have withdrawn the letter. Instead, he told the court that his letter reflects the truth of what happened and he was not forced to write the letter in the manner he did.

In *Mucha v Mucha* HH 101/09, BERE, J said, where evidence is properly backed by documentation, the credibility of the witnesses cannot be doubted. I agree with that conclusion. *In casu* the second defendant's own letter of March 2012 confirmed the plaintiff's case as presented by credible witnesses. Whilst under oath, the second defendant at the end of the trial, confirmed that what he wrote in his letter to the plaintiff in March 2012 was true. That truth disposes of this matter. The evidence in this matter denies this court any opportunity to refuse the plaintiff the relief it has prayed for. The plaintiff has, on a balance of probabilities, managed to prove its case.

I therefore order as follows:-

1. The 2nd defendant be and is hereby ordered to pay the plaintiff the sum of US\$31 351-91 with interest thereon at the rate of 60% per annum from 1 November 2010 to the date of payment in full;
2. The property known as a certain piece of land situate in the district of Salisbury, called stand 2300 Glen View Township of Glen View, measuring 200 square metres Reg No.14567/2002 be and is hereby declared executable; and
3. The 2nd defendant shall pay the plaintiff's costs of suit on a legal practitioner and client scale.

Gill Godlonton & Gerrans, plaintiff's legal practitioners
Messrs Chirimuuta and Associates, 2nd respondent's legal practitioners