

MICHAEL JOHNSON
versus
PHILIP ELLSE
and
KAPP JACK TRADING (PVT) LTD

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 9 November 2015, 16 December 2015 and 13 January 2016

Civil Trial

R. Stewart, for the plaintiff
T. E Gumbo, for the defendants

PHIRI J: This is a case in which originally the plaintiff, Michael Johnson, sought payment from the first defendant, Philip Ellse, of the sum of US\$80 000-00 (eighty thousand United States Dollars) being the outstanding amount owed to the plaintiff for an outstanding loan together with interest up to the in *duplum limit*.

The plaintiff also claimed interest at the rate of 7% per month from the date of issue of summons to the date of payment in full.

The plaintiff also sought costs of suit on a legal practitioner and client scale.

Alternatively the plaintiff sought payment from the first and second defendant, Kapp Jack (Pvt) Ltd jointly and severally, the one paying the other to be absolved in the sum of US\$80 000 (Eighty thousand United States of American Dollars).

When the matter was referred to trial both parties appeared to have agreed and proceeded on the basis that the matter was between the plaintiff and the first defendant.

The main issue for trial was whether or not the first defendant was the principal debtor or borrower of the amounts due to the plaintiff.

The issue of the amount was not in dispute.

The plaintiff, Mr Michael Johnson, gave evidence at trial. He tendered two promissory notes which were the subject of this dispute.

The first promissory note stated;

“PROMISSORY NOTE

Principal amount: \$40 000.00 Date: 1 December 2010

FOR VALUE RECEIVED, I, Phillip Ellse (Borrower) of address Kappjack Trading, 15 Telford Rd) promise to pay Mike Johnson (Lender) the sum of Forty Thousand Dollars (\$40 000.00) on or before 31 January 2011 with loan being taken on 1 December 2010, and interest at the fixed monthly flat rate of 7% on the unpaid balance as specified below. The borrower agrees to also pay in full the amount it costs the lender to transfer the sum into his/her account.

Interest repayments shall be made on a monthly basis, consisting of \$2800.00 per installment on the 1st day of each month and continue through until the principal is paid in full. These will be paid in cash to Mike or Alex Johnson in Harare monthly.

Borrower agrees to stand surety in his own personal capacity

Payments will be applied first to interest and then to principal.

The Borrower must promptly inform the Lender of any change in name or address.

If the Lender prevails in a lawsuit to collect on this note, Borrower will pay Lender’s court costs, collection agency costs, and attorney’s fees in an amount the courts finds to be reasonable.”

The second promissory note stated;

“PROMISSORY NOTE

Principal amount: \$40 000.00 Date: 1 December 2010

FOR VALUE RECEIVED, I, Phillip Ellse (Borrower) of address Kappjack Trading, 15 Telford Rd) promise to pay Mike Johnson (Lender) the sum of Forty Thousand Dollars (\$40 000.00) on or before 31 January 2011 (agreement has been extended to end of August 2011) with loan being taken on 1 December 2010, and interest at the fixed monthly flat rate of 7% on the unpaid balance as specified below. The borrower agrees to also pay in full the amount it costs the lender to transfer the sum into his/her account.

Interest repayments shall be made on a monthly basis, consisting of \$2800.00 per installment on the 1st day of each month and continue through until the principal is paid in full. These will be paid in cash to Mike or Alex Johnson in Harare monthly.

Borrower agrees to stand surety in his own personal capacity

Payments will be applied first to interest and then to principal.

The Borrower must promptly inform the Lender of any change in name or address.

If the Lender prevails in a lawsuit to collect on this note, Borrower will pay Lender's court costs, collection agency costs, and attorney's fees in an amount the courts finds to be reasonable."

The second promissory note extended the payment period of the loan from 31 January, 2011 to end of August, 2011.

The plaintiff maintained that defendant approached him for a personal loan and that Defendant was the principal borrower of the loan in dispute. He led evidence that he obtained a precedent of the Promissory note, from the internet, and thereafter it, was signed by the defendant. This was witnessed by a Mr. Tony Havecroft. The plaintiff subsequently paid the requested Loan to the defendant's personal account. The second Promissory note was signed after the defendant sought an extension of the payment period. The defendant again held himself as the Principal borrower of the loan.

Mr Tonny Havecroft gave evidence which corroborated that of the plaintiff. He participated as a witness when the promissory notes were signed. He also led evidence that he was possibly present on two occasions when interest was paid.

In his plea the first defendant denied borrowing the money either in his personal capacity or "**on behalf of the First Defendant**". Presumably this was an error in the pleadings because subsequently in para 2.1 of the plea first defendant averred that he never borrowed money as a Principal, but did so on behalf of a third party namely Kapp Jack Trading (Private) limited as represented by a Mr.Moyo .

This was the same stance the first defendant took when he led his evidence. The first defendant maintained that he was never the beneficiary of the loan but one Mr. Sam Moyo the first defendant nonetheless confirmed that he signed the two promissory notes in dispute, He produced an Email which was marked as, exh 7,in which a request was made that the borrower was to be Kappjack trading.

I note that this e-mail did not refer to the borrower as Sam Moyo.

The court probed the first defendant (under reexamination) why if he was not the principal debtor, he signed the Promissory Note as the "borrower" of the loan? The first

respondent's response was that it was "silly" of him to have signed the Promissory Notes without recourse to legal advice.

In the court's view this sealed the first defendant's fate. The first defendant was clearly aware that he signed the Promissory Notes exh(s) 1 and 2 in his own personal capacity. The 'caveat subscriptor' principle clearly applies in this case.

A look at these Promissory Notes clearly reveals that "Phillip Ellse was the "borrower" and he also appended his signature "In Agreement" as borrower.

Furthermore the defendant did not lead any evidence to show why he did not seek any correction of the second Promissory Note if it was indeed true that he was not the principal borrower. The Promissory Notes in the present dispute speak for themselves and clearly the borrower is Philip Ellse and he agreed to pay in full, the fixed monthly flat rate of 7% on the unpaid balance.

I also hold that the defendant is in breach of the sanctity of the agreed, 'Bill of Exchange' evidencing an unconditional undertaking to pay having been breached.

In this regard I also refer to the judgment of my Sister Mushore J, where she held that:

"It being trite that where the parties enter into a contract freely and voluntarily, the court which interprets the contract must ensure that the contract becomes sacrosanct when enforcing it, the court cannot and is not allowed to create another contract for the contracting parties". See *First mutual Investment (Private)Limited v Jonsput Trading (Private) limited And Others* case no HH1/2016 at p 5.

Similarly it is the court's view that the first defendant failed to give any satisfactory answer when questioned as to why he did not seek to correct any errors that he merely stood as "surety" in respect of the loan in dispute.

I therefore find it hard to believe the defendant's attempts to try to escape liability on the basis that he was not the principal debtor in respect of the Promissory Notes in dispute. This conduct must be visited with a punitive order of costs as this was clearly a deliberate attempt to waste the Court's time, and, that of the plaintiff.

I agree with the plaintiff's submission that;

"when a document has been reduced to writing, the document is, in general regarded as the exclusive memorial of the transaction and, in a suit between the parties, no evidence to prove its

terms may be given, save the document or secondary evidence of its contents, nor may the contents of such documents be contradicted, altered, added to or varied by parole evidence.”¹

I further uphold the plaintiff’s citation of the Bills of Exchange Act [*Chapter 14:02*] in which a Promissory Note in s 88 (1) is defined as follows:

“A Promissory Notes is an unconditional promise, in writing, made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to the bearer”

I also uphold that in this case the amount claimed by the plaintiff is not in issue and that in the circumstances the plaintiff is entitled to his claim, due to the application of the *duplum* rule, to its claim as per summons in the sum of US\$80 000-00.

I also hold that the first defendant has unnecessarily and unreasonably dragged this matter for several years and that in the circumstances an order as to costs on a legal practitioner and client scale would be appropriate.

I therefore make the following order:

1. That the plaintiff’s claim against first defendant, for the sum of US\$80 000-00 be and is hereby upheld.
2. That the first defendant pays costs of suit on a legal practitioner and client scale.
3. That the first defendant pays interest at the rate of 7% per month from the date of issue of summons to the date of payment in full.

Wintertons, plaintiff’s legal practitioners
Chinawa Law Chambers, defendant’s legal practitioners

¹ See *Union government v Vianini Ferro-Concrete Pipes (pty) Ltd* (AD) 43 at 47 and *Nhundu v Chiota and Anor* 2007 ZLR 163 (S)