

CHRISTINE TSITSI CHIZANA
versus
SHEPHERD KEMBO
and
PETER MITAWA SAOPE

HIGH COURT OF ZIMBABWE
NDEWERE J,
HARARE, 25 July 2017 & 3 October 2018

Opposed Matter

T Gombiro, for the applicant
N Zvidzayi, for the 1st respondent
V.W Mazhetese, for the 2nd respondent

NDEWERE J: The applicant filed an application for joinder on 17 October 2016. In her founding affidavit, she stated that she was applying for the joinder of Shepherd Kembo as second defendant in case number HC 3419/16.

The background facts she gave were that in January 2013 she together with the first and second respondents entered into a verbal agreement wherein they agreed to obtain a loan facility for \$15 000 from the Agricultural Bank of Zimbabwe. She said in terms of the oral agreement, the loan was to be shared equally among the parties. She said repayment of the loan was to be on a *pro rata* basis. She said the first respondent agreed to bind himself as a co-signatory to the loan amount as security for a proper and equivalent distribution of the loan proceeds between herself and the respondents. She attached Annexure A, a deed of suretyship by second respondent and Annexure B, which she said were details of the loan account showing first respondent as a co-signatory. She said on 10 January 2013, a loan of \$15 000.00 was obtained from the Agricultural Bank and each party received \$5 000.00. After being sued by the Agricultural Bank the second respondent repaid the loan together with interest on his own.

On 28 April 2016 the second respondent issued summons against the applicant in case number HC 3419/16, claiming payment of \$35 000.00 being the loan repayment he made to the Agricultural Bank, including loan expenses. The applicant said she expected second respondent to sue the first respondent as well hence her application for joinder of first respondent to HC 3419/16.

The first respondent opposed the application. He filed opposing papers on 8 November 2016. He said there was no basis for him to be joined to the proceedings in HC 3419/16. He said he never bound himself as surety. He said second respondent wanted him to sign on the withdrawal of the money for second respondent's security and protection, otherwise the beneficiary of the loan was the applicant. First respondent said he never received any benefit from the loan. He said all that happened is that the applicant bought farming material from first respondent's company called Globavale Investments (Pvt) Ltd. He said if she thought there was anything he owed her, then she should sue him, instead of applying that he be joined for a loan he did not apply for or benefit from. He asked that the application be dismissed with costs on the higher scale.

The second respondent opposed the application. He filed opposing papers on 26 October 2016. He stated that first respondent was not involved in the loan agreement and applicant was raising joinder just to delay the main case. He disputed benefitting from the loan. He asked that the application be dismissed with costs on the higher scale.

The applicant filed an answering affidavit on 18 November 2016. Thereafter, applicant filed heads of argument on 3 January 2017. The first respondent filed heads of argument on 19 January 2017. The second respondent did not file heads of argument and was therefore barred.

The matter was set down for argument on 25 July 2017. After considering all the submissions by the applicant and first respondent, the court's determination is given below.

It is trite law that an application stands or falls on the founding affidavit. All essential facts to an application must be found in the founding affidavit and its attachments because the founding affidavit is the foundation of the claim raised in the application. It lays bare the case which the respondent must answer to. This position was emphasised by CHIDYAUSIKU CJ, in *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Others* SC 92/05.

In the present application, the applicant alleged a verbal agreement between her, first respondent and second respondent to borrow \$15 000 in her name, but apportion it equally to the three of them to the tune of \$5 000 *per person*. She attached Annexure A which is second

respondent's surety which was not disputed. She also attached Annexure B. She called it "details of the loan account" revealing first respondent as a co-signatory. However, an examination of B reveals a vague document. It does not indicate where it originated from, neither does it have a stamp signifying the date or ownership of the document. It is not certified a true copy of the original. At the top it has the names of applicant and first respondent, and the applicant's address is given. Then there are some figures which mean nothing unless explained. No one attached a supporting affidavit to confirm the origin of the document or what it meant. No one explained what the figures meant.

So we have applicant's claims of a verbal agreement and Annexure B whose authenticity is in issue; plus the surety document which was never disputed. That is all the applicant gave the court in the papers founding her claim for joinder against the first respondent.

The applicant said she got \$15 000 which was disbursed to all the three of them in \$5 000.00 batches. Yet she did not attach any paper trail showing the movement of \$5 000 from her loan account to first respondent.

So all we have is a vague and unsubstantiated verbal agreement and a vague and unauthenticated one page statement whose origin is not known. That cannot be sufficient to establish a *prima facie* basis for first respondent's joinder.

The respondents denied the alleged verbal agreement. They denied that the loan was for the three of them and they denied sharing the proceeds at \$5 000.00 each. In the absence of an admission of the verbal agreement by the respondents, it was necessary for the applicant to adduce proof of the activities which confirmed the alleged verbal agreement. This is where proof of funds leaving the applicant's loan account into first respondent's account would have confirmed the existence of the alleged verbal arrangement. She failed to provide such proof.

When she filed the answering affidavit, despite knowing that both respondents had denied benefiting from the loan, there was still nothing to confirm such benefit.

Instead, she caused more confusion by her answering affidavit. She said the loan was for \$30 000 although they only drew \$15 000.00. She admitted applying for the loan. She admitted owing \$35 000.00 to the second respondent.

If they shared the proceeds equally, why did she admit owing the whole \$35 000? The court would have expected her to admit one third of the \$35 000 only since the respondents would each

repay a third of the \$35 000.00 which was borrowed. How come she admitted owing the whole amount but then says first respondent should share the liability? The court's view is that she admitted being liable for \$35 000.00 because she knows she was the sole beneficiary of that loan to whom second respondent was surety.

She then attached another Annexure A entitled "Facility Loan Agreement." It is a photocopy and it is not certified. It also has two pages only; the first page and the last page with some signatures. The first page has a sentence which was left hanging, under the heading "Undertaking By Borrower."

"The Borrower hereby undertakes that so long as any amount is owing to Agribank in terms of this agreement it shall not mortgage, pledge, cede or encumber or alienate in any way any of its assets...."

"Thus done and signed by and for Agribank on 10 January, 2013."

Why was the court not given the whole agreement? What were the clauses between that uncompleted sentence and the last signed page? So instead of strengthening her case, the applicant raised even more questions with her answering affidavit.

She attached another Annexure B to her answering affidavit. This annexure B was better than the first one in that the statements were stamped with the Agricultural bank date stamp. The statements were thus clothed with some authenticity. But they did not take the case any further. All they showed were two deposits of \$200 each by the first respondent on p 29 of the record. Applicant wanted to rely on this as proof of joint operation of the account. Her first challenge is that by availing these statements in the answering affidavit, she denied the respondents the chance to explain the deposits. She therefore cannot benefit her omission to avail the documents in the founding affidavit. Her next challenge is the fact that what appears on p 29 are two deposits, not withdrawals. The basis of her claim against first respondent is that he enjoyed the proceeds from the loan, yet these pages do not reveal withdrawals by first respondent but deposits. Furthermore it is common knowledge that bank deposits can be done by anyone. Applicant and first respondent are related, so there is nothing unusual about first respondent making just two deposits of \$200 each into applicant's account.

She therefore cannot benefit from her omission to avail the documents in the founding affidavit. Her next challenge is the fact that what is depicted on p 29 are two deposits, not withdrawals.

In view of the above, the court's view is that the applicant failed to establish a *prima facie* case for joinder of first respondent in HC 3419/16. The application must therefore fail.

The first respondent asked for costs on the higher scale. During submissions, there was no sufficient justification for costs on the higher scale. Costs will therefore be granted on the ordinary scale.

Wherefore it is ordered that the application be and is hereby dismissed with costs on the ordinary scale.

Mberi Chimwamurombe Legal Practice, applicant's legal practitioners
IEG Musimbe & Partners, 1st respondent legal practitioners
Mazhetese & Partners, 2nd respondent's legal practitioners