

NYARADZO MERCY HLATSHWAYO  
versus  
EDSON CHARANGWA

HIGH COURT OF ZIMBABWE  
CHAREWA J  
HARARE, 14 March & 15 May 2019

### **Civil Trial – Provisional Sentence**

*J. Mudimu* with *Ms Gangazha*, for the plaintiff  
*P T Chakanyuka*, for the defendants

CHAREWA J: Plaintiff issued summons for provisional sentence against the defendant claiming payment of the sum of US\$ 95 000, together with interest thereon at the prescribed rate calculated from the date of summons to date of payment and costs on the legal practitioner and client scale.

#### **Facts**

The agreed facts are that plaintiff and defendant were lovers. Over and above their personal relationship they also had business dealings with each other. In May 2011 the parties signed an acknowledgment of debt, entered into the record by consent as Exhibit 1, wherein defendant acknowledged owing the plaintiff US\$95 000, which defendant undertook to pay in two tranches: US\$70 000 on 22 June 2011 and the balance on 22 July 2011.

According to the plaintiff the entire amount remained unpaid, hence the issuance of summons. According to the defendant, he paid off most of the debt with the outstanding balance being US\$715 in accordance with the acknowledgment of receipt entered into the record as Exhibit 2, dated 27 August 2013.

The dispute therefore is a factual dispute, hinging on the credibility of the parties as to which party is stating the truth, with regards to the issues whether

1. Defendant had extinguished his debt in full in terms of the acknowledgment of debt; and if so
2. Whether the acknowledgment of receipt related to the debt in question.

### **Submissions and evidence**

The plaintiff gave evidence on her own behalf and was supported by the testimony of one Annie Muvhuti.

Plaintiff testified that the advance to defendant was made during the early stages of their relationship when there was a lack of trust between them, hence the acknowledgement of debt, and that the defendant never repaid it. If defendant paid off the debt as he alleges, then he ought to provide the proof thereof. She stated that the relationship turned sour in 2013 when defendant assaulted her during a UNTWO Conference in Victoria Falls and stole US\$2515 from her purse. Exhibit 2 was thus an acknowledgment of part payment of this money, drafted by defendant's lawyers in Victoria Falls, so that plaintiff would not press charges of theft against defendant as he had made part restitution of the stolen money. As a result, she in fact did not file a complaint of theft against defendant, but only of assault. The defendant's lawyers in Victoria Falls were not even aware of the US\$95 000 loan and could not have drafted an acknowledgment of part payment thereof. Even her own witnesses had no knowledge of this debt. She admitted filing several reports against the defendant, most of which failed.

Annie Muvhuti corroborated plaintiff's testimony in material respects. She testified that she did not know plaintiff or defendant prior to the UNTWO conference, but met them in the accreditation queue. She confirmed that she knew nothing about the US\$95 000. All she knew was that she, together with others, assisted plaintiff to make the necessary reports to the police when she was assaulted by defendant. She confirmed plaintiff's testimony that during the assault case it came out that defendant had stolen US\$2515 from plaintiff's purse. She also corroborated plaintiff's testimony that defendant's legal practitioners negotiated a settlement wherein in exchange for payment of US\$1800 and an acknowledgement of the balance, plaintiff would not press theft charges. She testified that she was present from the time of her intervention at the hotel up to the attendance at the police station and that no mention was ever made of a debt of US\$95 000. She was of the view that defendant's allegation to the contrary was dishonest.

For his part, defendant confirmed signing Exhibit 1 and that his only proof of payment of that debt is his word and Exhibit 2. He claims that he did not keep a record of his repayments of the loan because he trusted plaintiff. He had no recollection as to the number of repayments he made or the amounts save for the US\$1800. Initially he claimed to have started repayments in November 2011, but later changed his story to state that he started making repayments in June 2011. He confirmed that Exhibit 2 made no reference at all to the US\$95 000 debt, and

had no explanation as to why his lawyer, who apparently had knowledge of the debt would not make reference to that when he crafted Exhibit 2. On why he had to date, not even paid the outstanding US\$715 in terms of Exhibit 2 he claimed that plaintiff had advised plaintiff to let bygones be bygones. Contrarily, he claimed that plaintiff was a vindictive woman who felt scorned because he had terminated their affair to devote himself to his family and had thus made false reports against him and filed numerous claims all of which failed.

### **Analysis**

I must state at the outset that on balance I found the plaintiff to be a more credible witness than the defendant, both in terms of demeanour, candour and the logic of her testimony. Given the support to her claim by the acknowledgment of debt and her averments that the loan and acknowledgment thereof were made at the beginning of their relationship when there was little or no trust between the parties, which defendant does not dispute, I have no doubt that plaintiff tells a more plausible story. That repayments were not done in terms of the acknowledgement were also supported by the defendant who contradicted himself, initially claiming to have started making payments in November 2011 and then recanting to claim that he started making repayments in June 2011.

Surprisingly, apart from the alleged repayment of \$1 800 towards the debt, defendant had absolutely no idea how many payments he made and for what amounts: this predicated on a written contractual agreement, paints him either as extremely foolish, or merely dishonest. The onus to prove repayment was on him, and he failed to discharge it. I am astonished at his legal practitioners' submissions, if I understood them correctly, that I should accept that he "probably" made repayment of the debt on the strength of an acknowledgment of receipt for US\$1800 in circumstances where he has not even paid the balance on that acknowledgment of receipt. Proof of payment cannot be predicated on probabilities: the defendant either paid or did not pay, and particularly since the alleged payment was in respect of a written debt, defendant has to produce his proofs of payment.

Nor do I find it reasonable or probable that plaintiff would have agreed to let bygones be bygones, when defendant himself labels her as a malicious person who has pursued numerous claims and made false reports against him because he had broken up with her. In the circumstances, the probabilities are actually that the plaintiff is more truthful in the narration of events, particularly since the defendant did not see it fit to obtain the testimony of his Victoria Falls legal practitioner who would no doubt have shed light on what transpired thereat.

In any event, I do not see the relevance of the numerous claims and reports made by the plaintiff against the defendant in this particular matter: the defendant borrowed money from plaintiff which he acknowledged in writing. It behoves on him to prove that he performed in terms of the acknowledgment of debt, and this he has woefully failed to do. If, as defendant claims, the acknowledgment of receipt of US\$1800 is not proof, on the face of it, of repayment of any stolen money, neither is it any proof of any repayment of the loan.

However, a witness, Annie Muvhuti, testified that she was present when this acknowledgment of receipt was crafted and signed and it had nothing to do with the loan of US\$95 000, which she knew nothing about. All she knew was that plaintiff had claimed that defendant had stolen US\$2515 from her and that this acknowledgment of receipt was in respect of that. I must point out that this witness gave a clear account of what transpired in Victoria Falls and was not shaken in her testimony. Her account had a ring of truth and I found her to be totally creditable.

Nor do I take much stock of the error of plaintiff's legal practitioner to still claim, in his closing submissions, provisional sentence after a full trial. The fact of the matter remains that in her pleadings plaintiff claimed payment on an acknowledgement of debt and defendant failed to prove that he discharged his indebtedness in terms thereof. I therefore find that the defendant has not discharged his debt in terms of the acknowledgment of debt and owes the plaintiff the amount claimed in the sum of US\$95 000 and ought to be ordered to pay it. Further, I find that the acknowledgment of receipt (Exhibit 2) for the amount of US\$1 800 is not related to the debt.

### **Costs**

The acknowledgment of debt which the defendant signed obliged him, in terms of clause 7, to pay costs of suit on a legal practitioner and client scale. The summons persists with the claim for such costs. Defendant has made no submissions as why the claim for such costs should not be granted. In the premises I find that plaintiff is entitled to the costs of suit as claimed.

### **Disposition**

Consequently, it be and is hereby ordered that

1. The defendant shall pay to the plaintiff the sum of US\$95 000 together with interest thereon at the prescribed rate from date of summons to date of payment in full.
2. The defendant shall pay the plaintiff's costs of suit on a legal practitioner and client scale.

*Messrs Mudimu Law Chambers*, Plaintiff's legal practitioners  
*Messrs Matizanadzo & Warhurst*, defendant's legal practitioners