

GRACE KAMPIRA
versus
EMMAH MUHAMBI

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 12 November 2013 & 20 November 2013

Civil Trial

Ms T. Mateisanwa, for the plaintiff
R. Mahuni, for the defendant

MATHONSI J: The plaintiff is an avowed money lender whose business is to lend money to members of the public at an interest of 30% per month. She is not registered as such. She has sued the defendant for payment of a sum of \$4 296-00 together with interest at the prescribed rate and costs of suit.

In her declaration she avers that on 6 May 2011 she entered into a written lending agreement with the defendant, in terms of which she advanced that money to the defendant which was payable on or before 6 June 2011. The defendant failed or refused to pay back the money. The defendant is opposing the claim and states in her plea that she did not borrow \$4 296-00 from the plaintiff as alleged. Instead she avers that she only borrowed \$300-00 from the plaintiff in early 2011 which she repaid. She adds that the agreement is in any event illegal and when unenforceable.

For trial, the issues were set out as;

1. Whether the plaintiff entered into an agreement to lend money to the defendant in the sum of US\$4 296-00.
2. Whether the agreement was reduced to writing and legally binding.
3. Whether the defendant owes money in terms of the agreement.

The plaintiff testified that she is a money lender who lends out money at a rate of 30% per month but she is not a registered money lender. She was not aware that she needed to register, something she only got to know when her dispute with the defendant was referred to the police at Harare Central. In lending out money she uses a standard lending agreement which is completed by the debtor upon being advanced money and signed by both herself and the debtor. The rate of interest however does not appear on that lending agreement as only

the debtor's details, the amount involved, the dates of loan advance and repayment are entered.

The plaintiff stated that she got to know the defendant as she used to work with her brother and later her brother and the defendant had ventured into business together. In May 2011 her brother had telephoned her to advise her that the defendant was looking to borrow money to start a business. Her brother had spoken highly of the defendant as a trustworthy person who would not have any difficulty repaying the loan because she was expecting her terminal benefits including a pension from her previous employer. The plaintiff authorised her brother to give the defendant her contact number after which the two fixed an appointment.

When the defendant telephoned her, she had advised her that she was seeking a loan of \$5 000-00 to start a business but the plaintiff had advised her that she could only raise \$4 300-00, which the defendant accepted. On 6 May 2011 the plaintiff proceeded to the defendant's place of work along Kaguvi Street in the company of her young sister, Idah Kampira. They used part of the \$4 300- 00 to board a taxi leaving them with only \$4296-00 which she advanced to the defendant. The latter filled in her details on the standard lending agreement which she signed. The plaintiff signed the agreement as creditor but inadvertently signed on the space provided for a witness. Her sister Idah Kampira signed as a witness. When they queried why the defendant was not providing her own witness she assured them that it did not matter.

The plaintiff stated that she assumed that the defendant, who only had her employees with her, did not want any of them to know that she was borrowing money and therefore decided against having any of them witness the agreement. In addition, she had developed some trust because the defendant was known to her brother who had given word for her. The sum of \$4 296-00 does not include any interest because the defendant had undertaken to pay her a flat interest of \$500-00 over and above that amount upon repayment which she had not incorporated in the lending agreement.

The defendant defaulted and at first she tried to elicit the assistance of her brother to cause the defendant to pay but this did not work. Several visits to the defendant also yielded negativity with the defendant waxing violent and verbally abusive each time she called upon the defendant to demand payment. Despairing, she reported the matter to the police resulting in the defendant's arrest and detention overnight at Harare Central Police Station. The police

told her that they could not pursue a criminal prosecution because the parties had signed a lending agreement making the matter a civil one.

The plaintiff produced a copy of a police report record and a warned and cautioned statement made by the defendant in answer to a charge of theft on 28 July 2012. The police record shows that the plaintiff filed a report on 27 July 2012 against the defendant. In response the defendant stated:

“I have understood the caution and I deny the charge completely. I never stole anything from the complainant nor even borrow the said US\$4 296-00 as alleged. All that I know is that I borrowed US\$300-00 from her early 2011 and paid back the money after one month. However, the complainant has been pestering me to pay it with interest ever since, but when I borrowed the US\$300-00, we had no such agreement. That is why she is now fabricating her alleges (sic)”

In that warned and cautioned statement the defendant clearly stated that she repaid the \$300-00 because they had no agreement as to payment of interest. That statement is at variance with what she stated in court that she repaid that amount with interest of \$150-00 which she said was 20%. Arithmetic teaches us that 20% of \$300-00 is \$60-00. It just does not add up.

Be that as it may, under cross examination, the plaintiff stated that after becoming aware that not only was she required to register as a money lender but also that the interest charged was regulated, she decided to abandon her entitlement to a flat interest of \$500-00. She is now claiming the return of what she advanced to the defendant, nothing more. She insisted that the defendant entered her I.D number on the agreement which turned out to be wrong, and signed the agreement. While acknowledging that the correct I.D number is 08-0776189-K-07 and not 08-07776189-K-7 which appears on the lending agreement, the plaintiff was of the view that the defendant may have deliberately entered a wrong number and slightly changed her signature because she never intended to repay the loan and wanted to use that anomaly as a defence.

She denied ever entering into an agreement with the defendant involving \$300-00.

Abisha Kampira, the plaintiff's brother who recommended the defendant to the plaintiff and also worked with the defendant at some stage and also ran a bar business with her at Glen View, also testified for the plaintiff. He corroborated the evidence of the plaintiff in that respect. In his collection (he could not clearly recall the exact amount of the loan), the plaintiff had advanced to the defendant “a couple of thousands.”

Idah Kampira, the plaintiff's sister also gave corroborative evidence on behalf of the plaintiff stating that she had accompanied the plaintiff to the defendant's place of business to advance the loan and had witnessed the agreement. The defendant operated a restaurant in Kaguvi Street. She also confirmed the verbal abuse by the defendant when they sought to recover the money.

The defendant testified that she is currently resident at No. 97 Stages, Cranborne and is employed at the canteen. She stated that she has never operated a restaurant at Kaguvi Street but that she was once employed there by one Stanley Masendu.

She denied entering into a loan agreement with the plaintiff for \$4 296-00 insisting that she only borrowed \$300-00 which was to be repaid with 20% interest after a month. That agreement was reduced to writing and she also retained a copy of it although she misplaced her copy. She repaid the \$300-00 but the plaintiff argued that as she had delayed in repaying it, she had to pay interest. That way, she was forced to pay an extra \$150-00 interest they having agreed on 20% interest on the \$300-00. I have already observed that these figures do not add up. The situation becomes even more problematic because the defendant possesses no single document to back her up.

The defendant corroborated the plaintiff's evidence on how the two met, through the plaintiff's brother. She denied signing the lending agreement maintaining that the signature appended on it is not hers. In that regard she drew attention to her signature on the warned and cautioned agreement which she said was demonstrably different from that on the lending agreement. In the absence of evidence from a handwriting expert, it is not possible to determine whether that is the case. Suffice though to state that there are similarities in those signatures.

Under cross examination, the defendant stated that she did not know where the plaintiff obtained her particulars which are entered on the lending agreement. She said that 2 years had lapsed between the time that they entered into the lending agreement for \$300-00 and the time that the lending agreement, exhibit 1, was allegedly signed. For that reason the particulars she had personally entered in the agreement could have faded overtime making it difficult for whoever wanted to transfer the information onto exhibit 1 to do so, hence the discrepancies. That explanation is difficult to follow because in her warned and cautions statement and indeed in her plea the defendant stated that the \$300-00 agreement was concluded "in early 2011". Exhibit 1 was allegedly signed on 6 May 2011. It is therefore not true that 2 years had lapsed, only months had.

The defendant also acknowledged that she once stayed at No7 Milnor Road Braeside which is the address given in the lending agreement. Regarding the ID number, one digit, namely “7” is added on the lending agreement and the “O” after the “R” is omitted. To my mind these omissions could have been deliberate, by a person who wanted to create the discrepancy as opposed to an oversight by a person forging a document.

While the plaintiff’s evidence has its own frailties regarding the nature of her money lending business, the issue of interest she derived from the transaction which was not fully and satisfactorily articulated and the appearance of the lending agreement she relies on which have some information entered in black ink while some is entered in blue ink allegedly by one person, the defendant, at least it is simple, straight forward and easy to follow. She also displayed an air of honesty especially in her readiness to reveal that she is an unregistered money lender charging 30 % interest.

The defendant’s testimony on the other hand is full of contradictions and confusion. I have alluded to some of those above. I also found the defendant extremely evasive and not only coy but also had a demeanour that was bad. For instance I found it difficult to accept that the defendant did not run a restaurant in Kaguvi Street, or that whatever transaction the parties had was not concluded at that place. I also found it strange that the defendant would try to disown her address. Equally strange is the story that a money lender like the plaintiff would advance a loan of \$300-00 without levying interest and only claim it on the basis that there was a delay in repayment.

What we have here is a case of “two bad superstars” Both parties have their own skeletons in the closet. It is unlikely that the figure of \$4 296-00 claimed by the plaintiff did not include interest and that interest was left out of the lending agreement, only to be paid at the benevolence of a plucky debtor. In my view, interest must have been factored in but in the absence of evidence as to how much that was I am unable to untangle that mystery.

It is highly unlikely that the plaintiff would, out of nowhere, just fall upon the defendant in the way she has done and falsely allege that she advanced money to her especially as she wields a document, never mind its frailties, which contains the defendant’s name, an ID number which is almost like hers, an address in which the defendant once resided and indeed a signature which resembles that of the defendant.

The defendant lost the opportunity of successfully contesting the claim by electing not to be truthful and proceeding on a clearly dishonest line that she did not receive any money from the plaintiff. She should have seized the opportunity to unmask the agreement for what

it is. By choosing to be evasive and untruthful the defendant not only lost the opportunity to take the court into her confidence as to the exact amount that she received from the plaintiff, but also did a very poor job of her defence. In the process the quality of her delivery was so poor, she made such a hopeless witness that I am left with no choice what so ever but to reject her evidence in its entirety. The law will help only the vigilant but not the sluggard. What remains however is the evidence of the plaintiff that she advanced \$4 296-00 to the defendant, which evidence has not been effectively challenged. The burden of proof resting on the plaintiff, is on a balance of probabilities. In my view the probabilities are tilted in her favour.

The defendant also lost the opportunity to contest the agreement on the basis of illegality. One cannot even begin to look into that where the defendant denies ever entering into the agreement in the first place, a denial which is as hollow as it is dishonest. The defendant cannot have her cake and eat it at the same time. Its either there was no agreement or there was one, albeit illegal. It is stated in *S v Marutsi* 1990 (2) ZLR370 (S) that:

“It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other not both.”

In the result, I order that

1. The defendant shall pay the plaintiff the sum of US\$4 296-00 together with interest there on at the rate of 5% per annum from the date of judgement to date of payment.
2. Costs of suit on an ordinary scale.

Legal Aid Directorate, plaintiff's legal practitioners
Mahuni & Matatu, defendant's legal practitioners