CLAUDIOUS NHEMWA
versus
GERALD JAILED MUJAJI

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 31 May 2016, & 9, 10 16, 17 June 2016, & 9 November 2016

Civil Trial

T. Zhuwarara, for the plaintiff
P. Chiutsi, for the defendant

FOROMA J: The plaintiff and defendant are ex-workmates and good friends whose relationship seems to have been poisoned by a failure of the one to repay the other monies loaned and advanced by the other in their business dealings.

As a result of the plaintiff sued the defendant for a debt totalling $317 000-00 together with interest at the ruling Barclays Bank prime lending rate and costs of suit on the scale of attorney and client. The plaintiff issued summons for provisional sentence based on an acknowledgment of debt in favour of the plaintiff acknowledging indebtedness in the amounts claimed.

On being served with the summons for provisional sentence the defendant filed an opposing affidavit to which the plaintiff responded by filing an answering affidavit. In the fullness of time the plaintiff's claim was heard on the unopposed roll resulting in the plaintiff's claim for provisional sentence being granted. Pursuant to order 4 r 33 of the High Court Rules the defendant filed an appearance to defend thus converting the matter to a defended action. Pleadings having been filed and closed a pre-trial conference was held at which the plaintiff and the defendant agreed the issues for trial as follows:

"(1) 1.1 whether or not the Acknowledgement Of Debt signed by the defendant is valid?

1.2 whether the plaintiff has *locus standi* to institute proceedings against the defendant

1.3 How is the amount claimed by the plaintiff arrived at.

At the trial after attending to some housekeeping issues trial commenced with the

defendant assuming the duty to begin as according to the pleadings the defendant had admitted signing the Acknowledgement of Debt thus shifting the onus onto the defendant to establish the defendant's defence. Before taking the witness stand the defendant moved the court to grant an amendment to defendant's plea which had been filed on 14 June 2016. The application was opposed by the plaintiff who argued that the amendment sought to be made was not procedurally correctly made as the applicant was moving the court to grant an amendment which entailed the withdrawal of an admission made in the original plea without the plaintiff's consent. It is important to note that in its original plea the defendant had pleaded generally disputing the plaintiff's entitlement to the relief sought and did not make specific allegations of fraud sought to be introduced against the plaintiff via the proposed amendment. The plaintiff also argued that the defendant who had admitted to signing an acknowledgment of debt in his opposing affidavit could not seek to withdraw his admission under oath by seeking to aver in the proposed amendment that the acknowledgement of debt had been obtained fraudulently. In the opposing affidavit the defendant did not challenge the Acknowledgment of debt which in terms of the plaintiff's declaration the plaintiff had pleaded as follows:

> "(5) On 5 June 2013 the defendant duly signed an acknowledgment of Debt which he clearly and unequivocally and unambiguously promised to pay the plaintiff the amount of $317 00-00. (The plaintiff had also attached to the declaration a copy of the acknowledgment of debt). The plaintiff thus argued that the defendant had neither in his opposing affidavit nor his plea disputed having signed the acknowledgement of debt nor qualified his signature."

In terms of the rules of pleading an averment made which is not expressly disputed is considered admitted see order 15 r 104 (2). The plaintiff thus considered that the allegation of fraud sought to be introduced in the proposed amendment was tantamount to a withdrawal of an admission of the regularity of the acknowledgment of debt and that in order to do so the defendant would need to make a court application for leave to withdraw the admission fully explaining the circumstances leading to the admission sought to be withdrawn being made- See *Keltex* v *Kenkor* HH 23/15. Defence counsel seems not to have been alive to the need for a court application as a procedural requirement to secure the withdrawal of an admission. The procedural need of a court application was stressed by GUBBAY JA (as he then was) in the case of *DD Transport Pvt Ltd* v *Abbot* 1988(2) ZLR wherein he said:

> "I had occasion to draw attention to the prevailing misconception that an amendment which involves the withdrawal of an admission is a right simply there for the asking on the contrary it is an indulgence. Before the court in the exercise of its discretion will grant such an amendment it will require a reasonable explanation both of the circumstances under which the

> pleader came to make the admission and the reasons why it is sought to resile from it. The court will have to be satisfied that the amendment is *bona fide* and that if allowed it will not cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him."

A court application is required as the opponent must be given an opportunity to oppose the application and fully ventilate the matter as there are issues of prejudice to be considered by the court in determining whether to grant the proposed amendment or not. The defendant did not make a court application for the amendment of its plea which entailed withdrawing an admission nor did he file any affidavit to establish the bona fides of the application which incidentally was made from the bar -see *UDC* v *Shamva Flora Pvt Ltd* 2000 (2) ZLR 210 H 217 C-F.

The inadequacy of the application was so glaring and yet defence counsel did not seem to appreciate it. It was for these reasons that the application to amend the defendant's plea was dismissed. Once the application to amend was dismissed the defendant took the witness stand.

When the defendant's attempt to introduce the defence of fraud failed to see the light of day the defendant found himself making desperate attempts to dislodge the acknowledgement of debt. His evidence dismally failed to convince the court. The defendant made desperate attempts to challenge the consequences of the admission he had made i.e that he had freely and voluntarily signed the acknowledgement of debt. The law clearly was not on his side. The court entirely discards the defendant's evidence as it failed to dislodge the acknowledgement of debt. The allegations of duplicity, cheating and swindling despite being made in strong language by the defendant did not weigh with the court given the parties' previous relationship as ex-workmates and friends..

Under cross examination the defendant made the following crucial concessions –

(1) that he initialled all pages of the acknowledgement of debt
(2) he knew the meaning of the Caveat subscripto rule
(3) he is an internationally recognized CEO
(4) he admitted that nowhere in his affidavit in opposition to the provisional sentence summons did he suggest that he had been robbed crooked cheated or defrauded
(5) he had given personal guarantees in his personal capacity for loans due to the plaintiff by his companies.
(6) although he provided personal guarantees for payment by his companies of debts he claimed the companies were not in any capacity to repay the loans and that

he did not read the acknowledgment of debt

After the defendant gave evidence the plaintiff took the witness stand and reiterated that the acknowledgment of debt was freely and voluntarily signed by the defendant and that the defendant was the alter ego of the various Companies of the defendant which owed him money as the plaintiff was to defendant's knowledge the alter ego of companies that had advanced the defendant's companies monies. The plaintiff made it very clear that he and the defendant were each the alter ego of their respective companies and that they had discussed and agreed that the defendant acknowledge his companies' indebtedness to him which he freely and voluntarily did through the acknowledgment of debt. This plaintiff insisted on because he had realised that the defendant was poorly managing his companies in which the defendant was 100% shareholder. The plaintiff denied cheating duping or defrauding defendant as alleged.

The court has no doubt that the suggestion that the plaintiff cheated duped or defrauded the defendant is a deliberate attempt to defeat the plaintiffs genuine claim. I dismiss these claims without hesitation.

The law is clear as to the legal consequences of an acknowledgement of debt.

There is a strong albeit rebuttable legal presumption that anyone who signs a document does so with the intention to enter into the transaction recorded by the document. See *Langeveldt* v *Union Finance Holdings Pty Ltd* 2007 (4) SA 572 (W).

This court has found and defendant has confirmed that he signed the acknowledgement of debt freely and voluntarily. Having realised that he could not possibly claim that he was forced by the plaintiff to sign it under duress the defendant made a last ditch attempt to disown the acknowledgment of debt by suggesting that he did not read the document before he signed it. – a feeble defence indeed long rejected in our law – *Nyika* v *Moyo* HH 145/10. This defence has also been rejected in South Africa – *Stiff* v *Q Data Distribution Pty Ltd* 2003 (2) SA 336 (SCD) See also *Mutsamba* v *Dube* HB 190/15. As observed by the plaintiff's counsel the defendant was no novice or illiterate simpleton. He is a former CEO of PG a blue chip company and director of several blue chip companies and also a holder of an MBA with the University of South Africa. The plaintiff described him as a chief executive officer of international repute which the defendant did not dispute.

How could a person of the above calibre be victim of the plaintiff's alleged fraud duplicity and trichery as the defendant sought to suggest.

The defendant had to make all these wild allegations against his former friend in the hope he could escape the consequences of the caveat subscripto rule – *Muziwa* v *FBC Bank* SC 67/15 – See also *Moosa* v *Slanziani* HH 485/15. These were indeed the desperate and last kicks of a dying horse.

Quite clearly the defendant in signing the Acknowledgment of debt bound himself and securely tied himself in knots as in the acknowledgment of debt he also signed away the defence of the *exceptio non causa debiti*. Despite this the defendant was not dissuaded as he attempted albeit unsuccessfully to raise the same said defence in his evidence.

The observation made in the matter of African Banking Corporation of Zimbabwe t/a Bank ABC v *PWC Motors and Ors* HH 123/13 namely that there is now a pattern manifesting itself where business people will stop at nothing in avoiding to pay legitimate claims and in the process play havoc on the economy is well worth repeating here as it is what motivated the defendant to raise the defences (lame though they turned out to be) against his own benefactor.

I find that the plaintiff has established his claim on a balance of probabilities and make the following order.

It is ordered that:

1. Defendant pay the plaintiff the sum of $317 000-00 with costs on a legal practitioner and client scale.

C. Nhemwa & Associates, plaintiff's legal practitioners
P Chiutsi, defendant's legal practitioners