FINESS BANDA
versus
ANGIE ZACHARIA

HIGH COURT OF ZIMBABWE
MWAYERA & DUBE JJ
HARARE, 26 January 2016 & 23 March 2016

Civil Appeal

T A Musekiwa, for the appellant
Ms *M R Zvimba*, for the respondent

MWAYERA J: The appellant was aggrieved by the decision of the magistrates court and thus instituted the present appeal. The court *a quo* ordered the appellant to pay $8 510-00 plus interest at the prescribed rate from the date of summons. It also ordered the appellant to pay costs of suit.

The appellant raised 5 grounds of appeal against the whole judgment of the magistrates court as follows:

1. The court *a quo* erred in law and failed in holding that the appellant should pay the sum of US$8 510-00 to the respondent being balance for a loan purportedly advanced to the appellant by the respondent in the sum of US$10 400-00 without giving due weight to the fact that the acknowledgement of debt which was the basis of the claim was signed under duress and that had same not been signed the respondent would have no basis for the claim as she had no other proof that she advanced a loan to the appellant.
2. The court *a quo* erred at law in fact when it totally disregarded the appellant's evidence which illustrated that she was forced to sign the acknowledgement of debt for a loan that was never advanced to her under duress due to the involvement of police officers who threatened her with arrest and prosecution at the instigation of the respondent.
3. The court *a quo* further erred at law and in fact when it dismissed the respondent's claim for interest at the rate of 7.5% per month as claimed in the summons after considering that the one purported loan agreement was verbal yet the same consideration and

reasoning was not given to the alleged verbal loan agreement. It is submitted the court *a quo* should have treated the alleged verbal loan agreement with contempt and uncertainty as it did the alleged verbal agreement on the rate of interest.

4. The court *a quo* erred in law and fact when it dismissed the appellant's counter-claim without taking into consideration evidence placed before it to the effect that several payments were made to the respondent at her instance for onward remittance to ZIMNAT Financial Services but some was never remitted or accounted for despite documentary evidence that was presented to the court *a quo* by the appellant in support of the counter-claim for the remitted funds.
5. The court *a quo* erred at law and in fact when it did not take into account the defence raised by the appellant and the counterclaim which would have entitled her at law to a dismissal of the respondent's claim with costs and judgment be entered in favour of the appellant's counter-claim and any other order which the appeal court may make.

In brief the appellant imputed a misdirection on the part of the court *a quo* in finding that the appellant owed the respondent the money claimed. It is apparent from the record of proceedings that the respondent and the appellant verbally entered into a loan agreement which was later reduced to writing by signing of an acknowledgment of debt by the appellant. It is apparent on record that the respondent advanced the appellant a loan of $10 400 in the presence of a witness one Barbra Marange. The witness also witnessed part payment of the loan by the appellant when she partly paid back to the respondent. The appellant wrote out and duly signed an acknowledgement of debt Annexure (a) p 35 of the record of proceeding. The acknowledgment confirmed the amount advanced as $10 400-00 and stipulated the part payments made. The document further alluded to an intended payment plan after going through reconciliation so as to ascertain the outstanding amounts basing on this acknowledgement of debt and corroborative evidence from the respondent and witness Barbra Marange. The court gave judgment in favour of the respondent. There was clearly no misdirection on the reasoning and finding of the court *a quo* which warrants interference by the appeal court.

The court *a quo* fully ventilated the unsubstantiated defence raised by the appellant that it was his children who borrowed the money and that they were paying the money direct to ZIMNAT. The other defence raised was also explored and exposed as false by evidence adduced

in the court *a quo*. If the appellant's children had borrowed the money then the appellant ought not have signed the acknowledgment of debt on their behalf and ought not have made part payments. The claim of having been kidnapped and forced to acknowledge the debt remained a bold assertion. The police refused to entertain the matter on the basis that it was a civil claim and they directed the parties to resolve the matter. The parties then engaged to come up with an acknowledgement of debt and payment plan. The parties entered into a loan agreement verbally and later the acknowledgement of debt was reduced into writing. There is nothing on record to show that the transaction or contract was punctuated by duress. There is no evidence that the signing and writing of the acknowledgment of debt was a result of violence or fear brought to bear on the appellant. The trial court properly assessed the totality of evidence and dismissed the claim of signing acknowledgment of debt under duress as a ploy to neglect the contractual obligation of discharging what was due to the respondent. In the case of *Mahbub Moosa* v *Omar Stanzian* HH 485/15 it was held:

> "The onus of showing that the acknowledgment of debt was signed through duress rests on the party making the allegation. The onus shifts on the defendant to show on a balance of probabilities that the acknowledgment of debt was not signed freely and voluntarily."

In the present case the appellant did not show how pressure was brought to bear upon her to sign the acknowledgment of debt. In the face of the loan agreement and the acknowledgment of debt the court *a quo* correctly held that, by signing the acknowledgment of debt the defendant freely admitted liability. A close reading of the terms of the acknowledgment of debt, reveals the amount owing, part payment made. The payment plan shows clear and accurate information of someone well versed, with the agreement. There is no indication of terms being dictated. The trial court cannot, in the circumstances be faulted for finding that the acknowledgment of debt was freely and voluntarily signed and as such binding on the defendant to liquidate his indebtedness to the respondent.

The appellant also sought to attack the decision of the court *a quo* in dismissing the counter-claim. That ground of appeal cannot be sustained as the court *a quo* meticulously assessed all the evidence and deduced that there was no basis why the appellant who was an employee of ZIMNAT would pay ZIMNAT Finance Services through the respondent. The court *a quo* read through the woven evidence by the appellant in the claim. The appellant sought

unsuccessful to confuse the court on individual loans advanced to her children by ZIMNAT Financial Services and the loan advanced to her by the respondent who had been given as an employer of the appellant's children in their individual loans with ZIMNAT Financial Services. The court *a quo* correctly assessed the separate transactions as the respondent would have no mandate or business collecting monies for a loan on behalf of ZIMNAT Financial Services. To that extent therefore the court *a quo* correctly dismissed the counter-claim by the appellant.

The court ordered the appellant to pay the outstanding amount on her indebtedness as reflected on the acknowledgment of debt. The magistrates court correctly ordered payment of interest at the prescribed rate. All the grounds of appeal raised by the appellant cannot in the face of failure to prove duress or undue pressure to sign acknowledgment of debt be sustained. The appeal has no merit.

Accordingly it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the respondent's costs.

DUBE J agrees: _____