

ZIADA MICROFINANCE  
versus  
NGONIDZASHE CHIGASA  
and  
WEBSTER VAMBE

HIGH COURT OF ZIMBABWE  
PHIRI J  
HARARE, 18 November 2015, 1 & 14 December 2015, and 18 January 2017

### **Civil Trial**

*S Hashiti*, for the plaintiff  
*I Matanga*, for the defendants

PHIRI J: These are two cases which were consolidated into one for the purposes of trial.

This was in view of the fact that the parties agreed that the causes of action were all similar. The cases started as the plaintiff's claims for provisional sentence, all based on, acknowledgments of debt executed on 28 November, 2013.

The two matters were referred to trial as the cause of action was the same.

The joint pre-trial minutes raised the same issues and these were,

1. Whether or not the acknowledgment of debt attached to the summons for provisional sentence is valid?
2. Whether or not the defendant received money from the plaintiff and is therefore liable to pay it?
3. Whether or not undue influence was brought to bear upon the defendant for him to sign the acknowledgment of debt?

The acknowledgments of debt which were the subject of the trial in case number 1717 and 1718 of 2014 and tendered in evidence as exh 1 and 2 were couched in almost identical terms.

Exhibit 1 was drafted as follows:

“(1) I, Ngonidzashe Chigasa.

ID No. 47-098796 S 49

DOB. 10 November 1974

Of No. Clereview Close, Mandara

(the Debtor) do hereby acknowledge that I am truly and lawfully indebted to ZIADA MICROFINANCE (Pvt) Limited (The Creditor) in the sum of

**US\$85, 010.00 (EIGHTY FIVE THOUSAND TEN DOLLARS ONLY)**

(2) I undertake to pay the amount at the rate of US\$5 000.00 per month with the first such payment being made on or before 31st January 2014

the second payment being made on or 25<sup>th</sup> February 2014

and thereafter, on each succeeding month. All such payments are to be made to Mamboasa Legal Practitioners

(3) I agree that all legal costs on a legal practitioner and client scale, collection commission in terms of Law Society By-Laws and any other costs incurred shall be payable and borne by me, including the costs of drawing up this agreement

(4) in the event of default of any of the terms, conditions and stipulations of this Acknowledgment of Debt, or failure to make any one payment when due, or should a default judgment be entered against the Debtor or should the Debtor's assets be attached in execution of any judgment obtained, then in such an event the Creditor shall forthwith be entitled to treat the full amount or balance thereof as due and payable without further notice.

(5) I agree that no extensions of time or other indulgencies in respect of any actions arising out of or in connection with the Acknowledgment of Debt granted by the Creditor should in no way prejudice, alter the Debtor's obligations in terms of this Acknowledgment of Debt.

(6) I agree that my address for the purpose of any written notice in terms of this Acknowledgment of debt is the address stated above which address I hereby choose as my *domicillium citande et executandi*.”

As aforementioned exh 2 was couched and drafted in almost identical terms save for the names and identity particulars of the debtor.

The amounts claimed by the plaintiff, remained the same, that is \$85 010.00 (eighty five thousand and ten dollars.) both defendants undertook to pay the aforesaid amount at the rate of US\$5 000.00 per month with the first such payment being made on 31 January, 2014.

Ironically, the opposing affidavits filed by both defendants, to the application for provisional sentence were identical. The plaintiff's replication thereof was similarly identical.

Again, the summaries of evidence and the defendant's summaries of evidence were identical, word for word despite the fact that this court was supposedly dealing with 2 different parties.

Be that as it may this court was invited to the evidence of the parties and witnesses to this case.

### **PLAINTIFF'S CASE**

#### **TENDAI SHOMWE**

Tendai Shomwe is a duly registered legal practitioner at Mambosasa Legal Practitioners. The name endorsed on the pleadings is simply "MAMBOSASA". He was the first witness to testify on behalf of the plaintiff.

He led evidence to the effect that he attended several meetings where the defendants came in to sign the acknowledgments of debt. He stated that the defendants were accompanied by one Dawirai Katsande and her sister. He led evidence that Dawirai Katsande, her sister and himself signed the acknowledgment of debt as witnesses when the documents were executed on 28 November, 2013.

He led evidence to the effect that there were no threats of violence or any duress or coercion of the parties into the signing of the agreements.

He indicated that there were no allegations or complaints by the defendants in respect of the validity of the agreements or circumstances surrounding the signing of the agreements.

He also denied the allegations made by defendants that no time frames, as regards payment, had been stipulated on the document.

The witness also stated, under cross examination, that on the day the acknowledgments of debt were signed, there were the 2 defendants, Dawirai's sister, Mr. Mambosasa and himself in the boardroom. Mr Mambosasa was the lead counsel in the deliberations which took place.

#### **Ms Vickie Williams**

The plaintiff called Ms Vickie Williams who led evidence to the effect that she was the Finance Manager of the plaintiff's company.

Her evidence was to the effect that the plaintiff dealt with a Mr Dawirai Katsande who was a representative of Simbi Africa (Pvt) Limited. She alleged that there were some fraudulent transactions carried out by Mr Dawirai Katsande and both defendants were aware of these transactions and had benefitted from the transactions.

Her evidence was that she believed that the defendants had benefitted “Indirectly” from a fraudulent transaction that had been perpetrated against the plaintiff hence the defendants acknowledging that they owed the plaintiff the monies claimed by the plaintiff.

She led evidence that she had had direct dealings with the two defendants and she submitted that:

“... We pressed criminal charges against Mr Katsande at the time. The two (Defendants) approached the plaintiff and acknowledged they had benefitted from some and not all the funds taken and that they would like to repay those amounts at which time they were referred to Messrs Mambosasa legal Practitioners”

This witness also indicated, under cross examination, that,

“In various places and in various agreements their signatures appear in various documents that they were used to perpetrate this fraud. These signatures resemble the signatures on the acknowledgement of debt.”

Nonetheless the court disregarded all the other evidence of this witness as it related to questions of her opinions and not that directly relating to the execution of the acknowledgments of debt.

This marked the close of the plaintiff’s case.

## **DEFENDANTS’ CASE**

### **NGONIDZASHE CHIGASA**

Ngonidzashe Chigasa was the first to testify as one of the defendants in this case.

He confirmed that he signed exh 1 which is the acknowledgment of debt in dispute.

He testified that in a period of two weeks and once or twice per day he received calls from a Mr.Kanyenze who asked him to go and see Mr Mambosasa of the plaintiff’s legal practitioners. He testified that he knew Mr Kanyenze as a member of the Central Intelligence Organisation (C.I.O.).

He also testified that he received calls from one Rosaline Katsande who asked him to come to some agreement with the aforesaid law firm.

He testified that these calls were not friendly. He stated that Mr Kanyenze was abusive and sometimes he would say:

“You have to make this right otherwise I am going to incriminate you.”

He indicated that he visited Mr Mambosasa’s offices as a result of the pressure coming out of these calls.

He testified that when he visited Mr Mambosasa’s offices he found Mr Mambosasa, Tendai Shomwe (the first plaintiff’s witness) Rosaline Katsande, a Mr Kanyenze and another gentleman called Mr Malvern. He indicated that the meeting was tense.

He was introduced to Mr Mambosasa by Rosaline Katsande. Mr Mambosasa chaired the meeting and the first question he asked the witness was;

“why are you not in jail?”

and

“Did you pay anyone to be out of jail?”

The witness testified that the agenda for this meeting “was to make us agree that we took money from Ziada Micro Finance.” However the witness stated, at the meeting, that he had been given money by one Dawirai Katsande and not the plaintiff.

The witness testified that he signed a document that had two pages. He initiated the front page and signed the second page. That document did not have time lines as regards payment. He testified that he told Mr Mambosasa that he owed \$39 000-00 thirty nine thousand dollars and not eighty five thousand dollars.

### Cross Examination

Asked as to whether he took any steps to challenge the acknowledgement of debt, the witness stated that he was going to do something about it. He also intimated that there was a lot of discrepancies and unprofessional behaviour on the part of Mr Mambosasa and therefore he told his lawyer that he wanted to pursue this issue.

Under cross examination the witness testified that he is the one who provided the identity number on the acknowledgment of debt. He also provided his date of birth and his address.

The witness was also cross examined as regards the statement at p 7 of the record, that is his Opposing Affidavit to the claim for provisional sentence, wherein it is stated; “ that is when

plaintiff's Attorney called me and I signed the Acknowledgment." As p 19 of the record wherein it is stated "on 28<sup>th</sup> November 2013 defendant was called by plaintiff's legal practitioners....." and he admitted that there was no mention of Mr Kanyenze or any other person.

Similarly the witness was cross examined as to whether any third parties were referred to in his opposing affidavit? He admitted there were none mentioned.

The witness was further cross examined as to why in the two weeks he was being alleged pestered he did not report the matter to the police or the Central Intelligence Organization? His answer was he did not.

He was further questioned whether he reported this to his lawyers and he confirmed he did. He was asked why he did not take his lawyer to the meeting and his response was that he was not thinking straight.

He was further probed why for 3 years after signing the acknowledgment of debt he took no action or report to the police or to the Law Society or to the C.I.O Supervisor?

His answer was that he did not but it was his intention to do so.

The witness was further challenged to produce proof that Mr Kanyenze exists and he reported that it was "easy" to do so – he could that if the court allowed it. He was questioned that if it was that easy why it took three years for him to do so. He retorted that it was not that easy.

He further admitted, under cross examination that Ms Rosaline Katsande did not threaten him but was trying to persuade him on "compassionate grounds" to visit Mambosasa's office and agree that he had borrowed money from Mr Katsande.

The witness further explained that he agreed to owing money to Mr Katsande, who, in fact owed money to Ziada Micro Finance. He stated that the acknowledgment of debt signed was to settle Mr Katsande's debt and not Ziada macro Finance's debt. He did not take money direct from 'Ziada.'

In this context the witness under re-examination relied on a letter from his legal practitioners to the plaintiff's legal practitioners dated 2 March 2015 and admitted into evidence as exh 5. Wherein his legal practitioners, among other issues wrote as follows;

"... Of major concern is the figure that each of our clients owe Dawirai Katsande. They allege they owe him \$38 000-00 not \$85 000-00 as in your client's summons. Secondly they are not sure if Dawirai Katsande had authorised your client's claim the monies on his behalf.

Our clients therefore would be amenable to signing a Deed of Settlement for \$38 000-00 each, with specific changes indicating that the money for and on behalf of Dawirai Katsande. Our clients therefore tender \$38 000-00 each and offer to pay \$1 000-00 per month together with cost of suit”

This marked the end of the first defendants’ case. The first defendant did not call any witnesses.

## 2. Webster Vambe

The second defendant testified on his own behalf.

The witness testified that he was a Director of Simbi Africa (Private) Limited and it was in this context that he entered into an agreement with one Dawirai Katsande about Simbi Africa Employees getting certain loans.

He testified that in connection with this matter he first received a call from serious frauds section, (Zimbabwe Republic Police) and was asked what had transpired between one ‘Katsande’ and Ziada Micro Finance. He subsequently gave a ‘warned and cautioned statement’ to the police.

He then signed a document, with Dawirai Katsande so that employees working with Simbi Africa would obtain “Pay Roll Loans”.

He also testified that he got an initial loan of \$40 000-00 from Dawirai Katsande and he repaid him \$1 000-00 in August 2012.

The witness testified that he received telephone calls from one Rosaline Katsande and one Malvern Maunde a ‘C.I.O’ (Central Intelligence Organization) operative. He stated that Rosaline Katsande also, called his, (the second defendants) wife and she also visited his wife.

The purpose of these calls and visits was that Rosaline Katsande wanted him to own up for the money that he owed Mr ‘Katsande’. He claimed that Rosaline reported that Katsande’s mother, whom the witness knew, wanted to collapse because of “Katsande’s issue.”

He also testified that Rosaline Katsande and her big sister were threatening to take furniture from his house.

He testified that the C.I.O operative ‘Malvern’ is the one who took him to Mamboasa’s legal practitioner’s offices. He met Mr Mamboasa and ‘his team’ consisting of Rosaline

Katsande, Malven Maunde, one Kanyenze and Mr Ngonidzashe Chigasa. (The first defendant). He later realised that Kanyenze was also a C.I.O operative.

He testified that he owned up that he owed Mr Dawirai Katsande a debt and he signed up for this.

He stated that the atmosphere at the offices was tense, he was threatened with all sorts of things such as arrest and jail. He testified that it was Mr Chigasa who said “lets sign” as the meeting was getting tense.

He stated that he signed a document consisting of two (2) pages and the following questions were put to him in his examination in chief:

“Q. Second page of the document confirm its you who signed?

A. It’s my signature yes.

Q. Document says you acknowledged you got \$85 000-00?

A. No I didn’t sign for \$85 000.00

Q. How much did you sign for?

A. I signed for \$39 00.00.

Q. Was the \$39 000.00 indicated on the document that you signed?

A. It was not indicated on the document. There were no time frames.

Q. The document also states that you agreed to standard payments in the sum of \$5000.00.

A. We didn’t agree to any payment what we only agreed is that we owed Mr Katsande money

Q. There are two pages. Second one has got your signature. Second page does not have your initials.

A. There were initials on the first page that we signed.

Q. What was on the document that you signed?

A. I was agreeing that I owed Dawirai Katsande \$39 000.00.”

#### Cross Examination

Under cross examination, the witness was asked to look at his opposing affidavit to the summons for Provisional Sentence and asked where he mentioned Mr Kanyenza, Malvern or any C.I.O operative who forced him. His response was it was not there.

The witness was asked that in para 1.2 of his opposing affidavit he stated that the Plaintiff's Attorneys called him to their offices but in his evidence in chief he stated that he was called by Malvern. He answered that both versions were correct.

He was also challenged where, in his summary of evidence he mentioned any C.I.O operative? His answer was that it was not there.

The witness was also challenged to show the court where in his papers (court papers) he stated that the document he signed was initialled. He answered that it was not in the documents.

The witness was further challenged that he had led evidence that on the document he signed one of the pages indicated that he owed Mr Dawirai Katsande \$39 000.00, and, yet in his opposing affidavit he said there was no figure.

His reply was that it was not a figure "but the figure that were not there were time frames and the amounts to be paid per month".

He was then challenged that he had lied, under oath, that the document he signed did not have any figures.

The witness was challenged to look at the Acknowledgment of Debt dated 28 November, 2013 and asked what steps he took to have it set aside or alternatively whether he reported this matter to the police?

His answer was that he was in the process of doing so and that he also raised it with his Attorney.

He was questioned whether his Attorney had brought any legal process challenging the validity of that process and his reply was "not yet".

That was the second defendant's evidence, and, he did not call any witnesses.

### Court's Analysis of the Evidence

It is this court's view that it finds that:

1. The Two Acknowledgments of Debt exh(s) 1 & 2 were executed on 28 November 2013 at the offices of Mambosasa Legal Practitioners.
2. The two defendants acknowledged that the signatures appearing on the Acknowledgement of Debt were their signatures.

3. The Particulars Appearing on the face of the Acknowledgement that is their names, their identity numbers, their dates of birth and their addresses were all supplied by the defendants.
4. That the defendants did not take any steps to set aside or invalidate the Acknowledgements of Debt in dispute up until summons were issued by the plaintiff.
5. The defendants did not raise any complaints to any authorities such as the Police, the C.I.O or the Law Society.
6. That the defendants did not take any action to challenge the Acknowledgements of Debt even after their, own lawyers had been informed about the alleged threats and or undue influence allegedly exerted on them.
7. The defendants have not settled the amounts they allegedly owed to one Katsande despite their admission after the pre-trial conference and or by the time this trial commenced.

The cumulative effects of these facts are that it is clear that the defendants have failed, on a balance of probability too, lead any evidence that the two Acknowledgments of Debt in issue were invalid.

Furthermore this court is satisfied that the defendants failed to justify that indeed they were threatened by members of the Central Intelligence Agency as alleged. They also failed to convince the court that they were indeed threatened or forced by Mr Mambosasa to sign the Acknowledgments of Debt in dispute.

Having allegedly raised a complaint with their own legal practitioners on the conduct of Mr Mambosasa it would have been reasonably expected that their own legal practitioners would have taken issue with him and or the Law Society?

The accounts as regards what transpired during the signing of the Acknowledgment of Debt appear to be different in respect of each of the defendants and clearly it was the courts view that the defendant's versions of what transpired at the signing of the Acknowledgments were materially different.

The failure of the defendants to call the so called C.I.O operatives and or the other witnesses who were allegedly threatening them also clearly demonstrated, to the court, that the defendants were not reliable witness.

Accordingly on a balance of probability it is the court's view that the plaintiffs have proved its case.

The *caveat subscriptor* rule referred to in the plaintiff's Heads of Argument and as amplified in the cited case of *Jane Nyika v Thembani Moyo and Ors* HB 145/10 clearly applies.

The defendants are clearly bound by their signature which appears on the Acknowledgment of Debts in dispute.

The cited reference to the remarks of ROBINSON J in *Intercontinental Trading v Nestle Zimbabwe Pvt Ltd* 199 311 ZLR 21 (H) is applicable to this case where the learned Judge stated:

"Businessmen beware. If you fail to honour your contracts then don't start crying if, because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract."

Similarly the remarks of BARTLETT J as he then was in *Industrial Equity Ltd v Walker* 1996 (1) ZLR 269 (H) 308 C are applicable in the present matter;

"Things that go round come around. Walker has had a merry dance. But he would, to my mind, be well advised to realise that the music has stopped and the time has come to pay the piper. Although with Walker's determination to divest himself of all things executable, I fear that the dance is not yet over and that it won't be long before the pipes are calling again and the last walks begins.

Accordingly I hold that, in both cases; namely, the cases of *Ziada Microfinance (Pvt) Ltd v Webster Vambe* case No. HC 1717/16 and *Ngonidzashe Chigasa* case number HC 1718/14 each of the defendants are ordered to pay the plaintiff:

- (a) The sum of US\$85 010.00 (Eighty five thousand and ten United States Dollars) together with interest on that amount at the prevailing rate from the date of default to the date of payment in full.
- (b) Costs of suit on a legal practitioner and client scale.