DINAH GUKUTA
versus
CHARITY BOKA

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 21 June 2022 & 25 January 2023

Civil Trial

D C Kufaruwenga, for plaintiff
G Mapaya, for defendant

MANYANGADZE J:

The plaintiff issued summons against the defendant, claiming the following relief:

a) "payment in the sum of US42 000.00 or its lawful Zimbabwean dollar equivalent.
b) Interest thereon at 10% per month calculated from the date of Summons to date of full payment.
c) Collection commission calculated in terms of the Law Society By Laws.
d) An order that the rights held by Defendant in certain immovable property being Stand 22871 Ruwa Township of subdivision of Sebastol held under Deed of Transfer No 4138/20 be declared executable.
e) Costs of suit on an attorney –client scale."

Particulars of the claim are set out in the plaintiff's declaration. In summary, they are that the plaintiff and the defendant entered into a loan agreement. The plaintiff lent the defendant an amount of US$30 000,00, on 30 November 2020.

The defendant was required to repay the loan in 6 monthly instalments. The loan accrued interest at the rate of 10% per month. The repayment was structured in such a manner that the monthly instalments would be allocated to interest firstly, with the final instalment allocated to the capital amount.

If defendant defaulted in any one instalment, the whole outstanding amount would become due and payable, plus interest at 10% per month.

The defendant failed to service the loan for 4 consecutive months being December 2020, then January through to March 2021. The total amount due, plus interest, was US$42 000,00.

Whilst admitting to entering into the said loan agreement, the defendant disputed receiving an amount of US$30000,00. He avers that he was only advanced an amount of US$15 000,00. The plaintiff failed to honour her commitment to the agreed loan amount of US$30000,00.

At the hearing of the matter, after the plaintiff's legal practitioners made the plaintiff's brief opening statement, Mr *Mapaya*, on behalf of the defendant, raised a point *in limine*. He objected to the evidence for the plaintiff being led from Mr Innocent Taruvinga. The plaintiff is based in the United Kingdom. She issued a special power of attorney to Mr Taruvinga to prosecute the suit on her behalf. The special power of attorney is dated 7 June 2021 and is filed of record.

The defendant contended that there is no plaintiff before the court. Mr *Mapaya* submitted that this witness i.e. Mr Taruvinga, was not part of the loan transaction. He did not execute the agreement and was going to give what would essentially amount to hearsay evidence. If Mr Taruvinga is allowed to testify, argued Mr *Mapaya*, what he says will amount to irrelevant and hearsay evidence.

On the other hand, Mr *Kufaruwenga*, on behalf of the plaintiff, averred that the defendant's objection was taken prematurely. The defendant was putting the cart before the horse. She was rejecting testimony and evidence that had not yet been placed before the court. In this regard Mr *Kufaruwenga* remarked,

> "In my 26 years as a trial lawyer, this is the first time I have heard a lawyer objecting to evidence which is not yet before the court."

In the submissions he made, I did not hear Mr *Mapaya* impugn the validity of the power of attorney conferred on Mr Taruvinga by the plaintiff. The gist of his contention was that the evidence to be adduced from Mr Taruvinga was irrelevant, constituted hearsay, and was of low if any probative value at all. He relied on s 48 of the Civil Evidence Act [*Chapter 8:01*] and averred that the court has the power to exclude such evidence.

Section 48 of the Civil Evidence Act provides as follows;

(1) "Notwithstanding anything in this Act but subject to subsection (2), a court may exclude or refuse to allow the giving of any evidence which-
   a) has been obtained illegally or improperly; or
   b) is likely to cause confusion or an undue waste of time; or
   c) is likely to cause undue prejudice to a party to the proceedings.

(2) In deciding whether or not to exclude or refuse to allow the giving of any evidence in terms of subsection (1), the court shall have regard to –
   a) the nature and extent of the illegality, impropriety, confusion, waste of time or prejudice, as the case may be; and
   b) the probative value of the evidence; and
   c) the interests of justice as between the parties; and
   d) the general public interest."

A reading of the above section shows that the powers circumscribed in subsection (1) are exercised upon a consideration of the factors set out in subsection 2. In my view, this process entails hearing the evidence and then assessing, *inter alia*, its probative value. In this regard, I agree with the plaintiff's argument that in exercising the power bestowed on it by s 48(1), the court must first consider whether the factors listed in s 48(2) apply to the evidence. It is therefore impossible for the court to take into account the factors listed in s 48(2) before it hears such evidence.

This approach, it seems to me, is in line with s 50 of the Civil Evidence Act, which provides:

"(1) For the purpose of determining whether or not any statement, matter or thing, is or should be admissible in evidence or privileged from disclosure in terms of this Act, a court shall be entitled, but not obliged.

(a) to examine the statement, matter or thing; and
(b) to hear evidence or receive information concerning the statement, matter or thing or concerning its admissibility; and may make such order in respect thereof as the court considers appropriate."

Instead of responding to the plaintiff's opening statement with the defendant's opening statement, the defendant has opted to block whatever evidence the plaintiff intends to lead by arguing that it is hearsay or a waste of time. The defendant seeks an order striking off the plaintiff's claim from the outset, without proceeding with the trial.

It was pointed out, on behalf of the plaintiff, that when the plaintiff's witness is placed on the stand, the defendant will have all the time he needs to object to every piece of evidence led by or on behalf of the plaintiff, as it is being adduced.

In my view, the plaintiff must be allowed to place her evidence before the court. The court then firstly rules whether or not such evidence, or some aspects thereof, is admissible. Secondly, if the evidence is ruled admissible, the court then assesses its cogency or probative value. The defendant must simply make her own opening statement, just as the plaintiff has done, and allow the trial to proceed. In the course of the trial, some evidence may be ruled inadmissible, depending of course on the validity of the objections raised. Ultimately, it is up to the court, after hearing submissions, to determine the admissibility and weight to be attached to any evidence placed before it.

In the circumstances it is the court's considered view that the point *in limine* raised by the defendant is without merit and should not be upheld.

In the result, it is ordered that;

1. The defendant's point *in limine* be and is hereby dismissed.
2. The matter proceeds to trial on the merits and for that purpose shall be set down in terms of the rules.
3. Costs shall be in the cause.

Dzimba, Jaravaza & Associates, plaintiff's legal practitioners
Mapaya & Partners, defendant's legal practitioners