EMCEE COLLECGE

Versus

GEORGE RATISAI

IN THE HIGH COURT OF ZIMBABWE
MUTEMA & TAKUVAJJ
BULAWAYO,20 OCTOBER & 4 DECEMBER 2014

J. Mutambara (appellant representative)
Respondent in person

Civil Appeal

MUTEMA J: This appeal is redolent of irregularities, confusion and vagueness.

Plaintiff issued summons in the Magistrates' Court against defendant claiming a sum of US$ 4 585,00 and costs. The particulars of claim read in pertinent part as follows:

> "Sometime in October 2011 defendant requested for $5 800,00 from Plaintiff which was to be paid back the following day after he had bought his cattle from an auction. Defendant failed to do so after having sold his cattle but only paid $1 300,00 after Plaintiff had made heavy persuits to Defendant. A balance of $4 500,00 remained outstanding and efforts to recover the same proved fruitless. Plaintiff engaged other stakeholders to assist him in receiving his money, whereby an agreement was entered into where Defendant was to pay back the proposed amount as in initial amount borrowed or outstanding at the time the agreement was made and for the same period as was enjoyed on the principal by Defendant.
>
> WHEREFORE Plaintiff prays for judgment in the said sum of:
> 1. $4 850
> 2. Cost of suit
> 3. Interest at tempo morae (sic)"
>
> What can be distilled from the appellant's purported dispute with the respondent is this:

The parties are long time friends. Respondent borrowed $5 800 from J. Mutambara. J. Mutambara is the director of appellant. Mutambara withdrew the $5 800,00 from appellant's bank account which he then lent to respondent to purchase cattle at an auction. Respondent runs a butchery business. The agreement was that the loan would be repaid the following day, conditional upon approval and disbursement of respondent's applicant for a loan from his bank.

However, the bank loan did not materialize hence failure to repay the amount as agreed.

Respondent repaid the loan in bits and pieces over a longtime. When he tendered the last $85.00 appellant refused to accept it. So effectively respondent repaid $5 715 out of the principal debt of $5 800,00. When the amount still owing was $4 500,00 the parties concluded what they dubbed "Memorandum of Understanding" on 22 November, 2011. The essence of this memorandum of understanding (exhibit 2 page 20 of the record) was that respondent should lend appellant $4 500,00 – the amount of the balance respondent owed the appellant as at that date – and appellant would take the same period as that taken by respondent to pay back the loan.

The learned trial magistrate found that by the time the trial was held, the respondent had repaid all what he owed the appellant but had not managed to honour the loan advancement he had promised to give to appellant as per the memorandum of understanding. On that score the trial court held that respondent owed appellant nothing and appellant cannot force respondent to advance a loan to him. In the event, appellant's claim was dismissed with each party bearing its own costs.

It is against this ruling that appellant lodged this appeal. Patience and tolerance are virtues which must be inherent in any judicial officer and should be exhibited especially when dealing with lay people to whom the intricacies of adjectival law are alien. The notice of appeal which was noted *in casu* is very much defective on account of the dearth of clarity and precision. Instead of specifying what exactly is being appealed against for it cannot be against the whole judgment because it was proven and accepted that $5 715,00 was repaid and the balance of $85,00 was tendered and refused, the appellant went to town and chronicled the entire history of his grievance. On that account alone the appeal is dismissible.

But since appellant is a lay person we decided to bend backwards and hear the merits. The real issue is whether the respondent can be held to the memorandum of understanding concluded by the parties on 22 November, 2011, in other words whether it is a binding contract. In Wikipedia, the Free Encyclopedia, a memorandum of understanding is defined as a bilateral or multilateral agreement between two or more parties, expressing a convergence of will between them, indicating an intended common line of action. It is often used in cases where parties either do not imply a legal commitment or in situations where the parties cannot create a legally enforceable agreement. It is a more formal alternative to a gentleman's agreement.

The appellant argued that this agreement "was (and still is) a fair and standard

arrangement both at business and social level. Women engage in "rounds" for mutual social and economic upliftment, business interborrow on equal terms for mutual benefit, banks do the same and university libraries as well. The difference is that these are morally upright and principled entities. The magistrate erred by not considering this fact of moral uprightness and principle as put across by Applicant (*sic*) during cross-examination of Defendant."

It is pertinent to note that appellant is mixing law and morality. While law has nuances of morality in it, it necessarily follows not that morality equals law. For an agreement to be legally binding and consequently enforceable at law, the requirements of offer and acceptance, consideration and the intention to be legally bound (*animus contrahendi*) must all be present. The memorandum of understanding in this case was simply a gentleman's agreement, implying no legal commitment hence no intention to be legally bound. It is accordingly not enforceable at law.

In the result the appeal be and is hereby dismissed in its entirety with costs.

Takuva J ……. I agree