

NTANDOYENKOSI NDLOVU  
**versus**  
VIMBAI MANEMO

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 14 FEBRUARY, 8 MARCH 2019 AND 21 MARCH 2019

**Civil Trial**

*B Masamvu* for plaintiff  
*I Mafirakureva* for defendant

**MOYO J:** In this matter plaintiff issued summons claiming the following:

- 1) An order for the payment of the sum of \$25000-00 by the defendant to the plaintiff the same being in respect of monies loaned and advanced to defendant by plaintiff at defendant's specific request and instance on or about the 23<sup>rd</sup> of July 2015, which amounts despite lawful debt, defendant has failed and neglected to pay.
- 2) An order that defendant pays interest at the prescribed rate on the sum of \$25000 calculated from 23 July 2015 to date of full payment.
- 3) An order that defendant's motor vehicle a Mercedes Benz C2200 registration number ABI 9423 be declared specifically executable as per the agreement between the parties.
- 4) An order that defendant pays the costs of suit.

The facts of this matter are that plaintiff and defendant loaned each other a sum that plaintiff says was \$25000-00 but which defendant says was \$20000-00 with \$5000-00 being added interest. Plaintiff says the money was never repaid and defendant says it was. Defendant's Mercedes Benz motor vehicle was used as security for the loan. It is however in defendant's possession and plaintiff avers that this was done clandestinely.

Plaintiff's case

Plaintiff gave evidence for himself. He told the court that he knew defendant through her agent Melusi Sibanda who came and told plaintiff that defendant wanted to borrow some money and use a Mercedes Benz as collateral. He further told the court that defendant said the Mercedes Benz could be disposed of in the event of a default.

He told the court that the money was given to the defendant in June 2015. An agreement was signed between the parties. The agreement was produced in court and marked as Exhibit 1. Plaintiff further testified that defendant gave up her motor vehicle, its registration book and car keys as collateral.

The registration book was tendered and marked Exhibit 2.

The car keys were also tendered and marked Exhibit 3. Plaintiff later told the court that defendant did not comply with the terms of the agreement in that she failed to repay the loan. Plaintiff also told the court that he knew Melusi Sibanda as Defendant's agent.

Asked under cross-examination if Exhibit 1 was prepared by Melusi Sibanda plaintiff said, no the agreement was prepared by him and only printed by Melusi on his instructions. He said the motor vehicle that was given to him by defendant as collateral was kept at Ascot Mews by Melusi.

Under cross-examination it was put to the plaintiff that defendant alleges that she was lent \$20000-00 and \$5000 was for interest and plaintiff disputed that. Challenged that he could not lend defendant that kind of money with no incentive he said that he was looking forward to business favours from the defendant.

A further question was put to plaintiff that defendant paid everything including the illegal interest, to which the plaintiff denied receiving any payment. Those were the material aspects of the plaintiff's case.

The defendant's case

Defendant gave evidence for herself and also called one Melusi Sibanda as a witness.

Her testimony was that in June 2015 she told Melusi that she needed money and Melusi referred her to plaintiff. Plaintiff lent her \$20000-00 and said that it would earn \$5000-00 interest.

Melusi then called plaintiff to his office and that since plaintiff had no money lenders' licence, they would craft an agreement to the effect that she borrowed \$25000-00 so that it is safe.

She agreed, borrowed the initial \$20000-00 that she then repaid in June. She paid this money to plaintiff through Melusi. She borrowed the money again in June 2015 and repaid it in July. That is the amount being the subject matter of this dispute. Again, when she repaid this money she called Melusi. Melusi in turn called plaintiff, who said he was out of town in Maitengwe. Plaintiff directed that they should give the money to his wife. She said plaintiff's wife was called and received the money from Melusi. She produced an acknowledgement of receipt by Melusi to show that he had received the money on 20 July 2015. She denied forcibly taking back her motor vehicle and she told the court that she was given the car by Melusi and plaintiff and she took back her keys.

On whose agent Melusi was, defendant said Melusi looked for clients for plaintiff. She said the reason why plaintiff was claiming that he was not paid could be that he became jealous of defendant's car and thought that he could take the motor vehicle seeing she is a woman and he is a young man. Challenged on the aspect of payment, that she had lied that she paid the sum to Melusi who gave the money to the wife, she said she did and the wife came to Ascot driving a quantum. Defendant also alleged that Melusi signed the acknowledgment of debt before she gave him the money.

#### Melusi Sibanda

Melusi told the court that:

1. He met defendant through some friends and he was a regular client at her motor spares shop.
2. That defendant was looking for finance urgently and could not use banks as they take longer to process.
3. Defendant happened to call him about her quest for finance, when Melusi was in a motor vehicle that plaintiff was also in and he heard their conversation and said that he would avail the facility.
4. Defendant was looking for \$20000-00 payable with a premium and with collateral.

5. The two parties then went to his office, plaintiff availed the \$20 000-00 to defendant and she used her car as collateral.
6. The loan was lent for a month and if she failed to pay her car would be forfeited.
7. She paid back the money on time.
8. Defendant decided to borrow the \$20000-00 again.
9. Melusi was the convener and he would charge a small fee to the lender.
10. He later told the court that the small fee was a sum of \$400-00.

He said he drafted the documents and the car was kept at his friend's place in Ascot.

- After a month defendant called Melusi to say she had the money Melusi in turn called plaintiff. Plaintiff was out of town and he instructed that the money be paid to the wife who then came and collected the money from him.

He was shown Exhibit 4 (b) and he said he recognizes the document but it was done a lot later about a year ago, and that he did not know at that time that the parties had already taken each other to court.

He said that his colleague kept both the car keys and the registration book. Melusi said he believed the parties lent each other some money some other time later when he was not involved and he believed those are the transactions that created problems due to non-payment.

Melusi said plaintiff's wife collected the money whilst driving a kombi. From the plaintiff's version and the defendant's version, there is a dispute on how much was loaned, was it \$20 000-00 or \$25 000-00?

There is also a dispute as to how defendant recovered her motor vehicle and the keys.

There is also a dispute as to whether the sum loaned in June 2015 and payable in July 2015 was paid. There is also a dispute as to what role Melusi played in the transactions, whether Melusi was plaintiff's or defendant's agent.

Melusi's testimony clarifies these issues. This court believes that whilst either plaintiff or defendant may have told untruths' and half truths in certain respects, Melusi appeared to be telling the truth as to what he knew.

I say Melusi was truthful in that:

- a) Melusi admitted that he prepared the transactions for a small fee that was payable by the lender. The nature of the transactions entered into were not clear legal transactions so

much so that Melusi could have hidden this aspect on his role if he wanted to hide certain information.

Melusi admitted that the sums were lent at a premium and said it was not interest *per se* as the plaintiff was not a registered money lender meaning he did not want to nail the plaintiff as a person who operated as an unlicensed money lender.

- b) He said both parties were his mutual friends and that he did not know that they had taken each other to court, and that he was still trying to negotiate an amicable settlement between the two and was hopeful that one was on the way.
- c) He seemed disappointed by the conduct of the duo and he seemed keen on good relations with either. As a result, the court rules out any collusion by Melusi with either party because Melusi told the court information that was disadvantageous to both parties. For instance he told the court that plaintiff lent defendant \$20000-00 and that \$25000-00 included \$5000-00 interest, but he also told the court that defendant asked him to sign the acknowledgment receipt of the money a lot later than the time he received it and that he did not know that at the time the parties had already taken each other to court.
- d) Melusi also told the court that he believes there is more to this dispute than either party has told the court as he believes they continued lending each other monies until when they fell out of each other.

Melusi's testimony is therefore clearly what this court should use to unravel the dispute between the parties.

I accordingly draw the following conclusions.

1. Plaintiff lent defendant \$20000-00 with a premium of \$5000 making it a total of \$25000-00.
2. That plaintiff's assertion that he was just lending defendant for no gain as he was looking forward to business favours is not true, because Melusi charged plaintiff \$400-00 to draft the documents meaning that this was a purely financial transaction for financial gain. Plaintiff could not pay Melusi \$400-00 to draft these agreements when he himself (plaintiff) was not gaining anything financially. It therefore makes sense to conclude that plaintiff charged this interest.
3. Defendant paid back the money as witnessed by Melusi.

4. It is not clear under what circumstances defendant got back her car and keys leaving the registration book, as Melusi's friend, in whose custody these things were allegedly in, was not called to testify on what happened to these things.. That is, how the registration book ended up with plaintiff and how the car keys, and the car ended up with defendant.

Plaintiff's counsel suggested that defendant gave a new line of defence in her case and thereby taking plaintiff by surprise who had not called his wife to testify. In her plea defendant pleaded that the sum loaned was paid obviously, the how, to who, and where was a matter for evidence. In her plea, defendant was duty bound to answer the issue of non-payment by alleging that she paid and bringing witnesses to testify in court in that respect which she did. Perhaps plaintiff could have avoided the pitfall of defendant proving payment in a manner he would not have canvassed in his case, by requesting for further particulars as to how, where and when payment was made.

Otherwise defendant's plea is sufficient on the response that the monies were duly paid back. What was left was for defendant to prove such payment which she did through calling the evidence of Melusi Sibanda who is mentioned in the synopsis of evidence.

I accordingly did not find any shortcomings on defendant's pleadings. Defendant's counsel submitted that the agreement entered into between the parties was unlawful in that it contravened section 3(1) of the Money Lending and Rates of Interest Act [Chapter 14:14] in that plaintiff lent defendant funds at an interest yet he was not a holder of a valid money lender's licence.

Plaintiff's counsel responded to this contention by submitting that this was never put to the plaintiff. Since this is a question of law, it does not matter if it had been put to anyone to comment on the law. The law is the law, if the facts before the court show that the law was breached, the court need not be bound by any questions that were put or not put to a litigant. What matters is that plaintiff denied that the transaction was at an interest and Melusi's evidence proved that in fact it was at an interest and this is in direct breach of the law. The facts in each case speak to the legal issues raised and the facts of this matter are that a sum of \$20000-00 was lent to earn \$5000-00. The agreement by the parties although it says \$25000-00 was lent, this court has Melusi's evidence to rely on that aspect and conclude that \$20000-00 and not \$25000-00 was loaned. Melusi confirmed that this whole transaction was for financial gain where he

also benefited for drafting the documents. In any event, whether the transaction flouted the law or not, plaintiff's case would still fail on the aspect of the confirmed repayment by Melusi.

It is for these reasons that I find that the plaintiff has failed to prove his case on a balance of probabilities and accordingly his claim cannot succeed.

I therefore order as follows:

Plaintiff's claim fails and is accordingly dismissed with costs.

*Messrs Dube-Tachiona and Tsvangirai*, plaintiff's legal practitioners  
*Messrs Moyo and Nyoni*, defendant's legal practitioners