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Eva Chiboni v. New Future Finance Company Limited 2020/HPC/0776

Chanda Chungu
University of Zambia

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Facts

The Plaintiff, Eva Chiboni, required a sum of money for personal needs and approached the Defendant, New Future Finance Company Limited for a loan of ZMW250, 000. According to the Defendant, loans obtained from the company are usually repaid in a period of four (4) months, with interest.

Crucial to the loan transaction was the Defendant's requirement was to provide property as security. Considering the same, the Plaintiff gave the certificates of title to her property in Lusaka to the Defendant and sign a contract of sale and deed of assignment. Crucially, the Plaintiff informed the Defendant's Manager that she could not read or understand the contents of the documents she was signing but the Manager assured her that they were a mere formality. The Plaintiff's son also read through the documents and was equally informed that the provision to sell was a mere formality.

The loan agreement was subsequently signed and entered into, coupled with the contract of sale and deed of assignment. Despite seeking ZMW250, 000, the Plaintiff was availed with ZMW216, 000 as a loan. The agreement stated that she would repay the Defendant a sum of ZMW351, 000 in four equal instalments, inclusive of interest.

When the Plaintiff failed to repay the money in question, the Defendant sought to sell the property based on what have been outlined above.

Holding

The High Court, in a judgment delivered by Musona J held that the Defendant who had engaged legal representatives acted fraudulently and took advantage of the ignorance of the Plaintiff, who did not understand the nature of the transaction. On this basis, the court declared the transaction illegal, null and void ab initio.

The court thereafter varied the amount to be repaid by the Plaintiff. It was ordered that the Plaintiff repay the Defendant the loaned amount of ZMW 216, 000 plus the minimum interest under the Money Lenders Act.

Significance

Where a person appends their signature to a document, they are deemed to know what its contents are. As a general rule, therefore, a person is bound by their signature to a document, whether or not they have read or understood the document.[2] This principle stems from

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[2] *L'Estrange v Graucob* [1934] 2 KB 394.

L'Estrange v Graucob.[3] However, if fraud or misrepresentation has been used to induce a person to sign a contractual document, the transaction will be voidable. In *Wilton v. Farnworth*,[4] it was held that:

> In the absence of fraud…a man cannot escape the consequences of signing a document by saying proving that he did not understand it…it was for him to protect himself by abstaining from signing the document until he understood it and was satisfied with it.

The above makes it very clear that once a party to a contract signs a contract, they are bound by their signature. This is provided, they freely and voluntarily entered into the said contract. In other words, a party will only be bound to the terms that they expressed agreed to be bound to. By way of example, in *Colgate Palmolive (Zambia) Inc v Abel Shemu Chuka and 110 Others*,[5] it was held that

> If there is anything more than another, which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that, their contracts, when entered into freely and voluntarily shall be enforced by Courts of justice.

It should however be noted that notwithstanding the general rule that parties are bound by their signature, there are certain exceptions. This is where the contract is illegal or void or tainted with a vitiating factor.

As it relates to void and illegal contracts, there are contracts which are not permitted by statute or the common law such as wagering contracts, restraint of trade agreements, contracts that undermine the institution of marriage or those which oust the jurisdiction of the courts.

The position at law is clear that an illegal contract can be illegal at formation, or in the way is it performed. In the seminal case of *Mohamed S Itowala v Variety Bureau de Change*[6] the Supreme Court of Zambia guided that: -

> contractual right is said to be unenforceable on the ground that ex turpi causa non oritur actio this is an illustration of the general principles of the law regarding the effect of illegality on the formation performance and enforcement of a contract.

Further, in *Gideon Mundanda v Timothy Mulwani and The Agricultural Finance Co Ltd and Mwiinga*,[7] the Supreme Court said the following: -

> it must be made quite clear that the courts will never in any circumstances condone the flouting of the law; but we must approach this matter by considering whether it was possible for the parties to comply with their contract legally, in which event we must encourage such compliance.

The above underscores that the Supreme Court's view that contracts which are illegal will not be enforced. In other words, ordinarily, it will not be enforceable by the courts except where it is capable of being performed legally. In *Golf Consultancy and Tourism Limited v Chainama*

[3] [1934] 2 KB 394.
[4] (1948) 76 CLR
[5] SCZ Appeal 181/2005.
[6] SCZ Judgment No 15 of 2001.
[7] (1987) ZR 29 (SC).

Hills Golf Club Limited[8] the Supreme Court of Zambia dealt with a contract for the sale of land for US$6 000 000 or its Zambia Kwacha equivalent. At the time there was a law in place that prohibited quoting or selling goods or services of a domestic nature in foreign currency. The Supreme Court held that: -

> If a contract can be performed legally, then we must encourage such performance particularly in this case, where the contract was not illegal as to formation.

In the circumstances of the current case, the legal issue of illegality did not arise. The facts of the case illustrated that the Defendant, New Future Finance Company Limited had a licence in terms of the Money Lenders Act and thus were not acting contrary to the statute in this regard. In *Neighbours City Estates Limited v Mark Mushili*,[9] the Supreme Court dealt with a money lender that not registered in terms of the Money Lenders Act was engaged in an illegal activity due to the lack of an appropriate licence and the transaction was held to be illegal.

Despite the principles elucidated above, the High Court in this matter stated that the contract between the Plaintiff and the Defendant was illegal. However, the court did not state which statute or principle of the common law that the loan agreement was in breach of. It is submitted that this was a gross misdirection on the part of the High Court.

Perhaps the sole question of legality may be confined to the issue of the interest charged.

For the avoidance of doubt, in terms of contract law, under the principle of consideration must be sufficient but need not be adequate. This means that parties are free to make what contracts they desire, for example, by naming the price for which they are prepared to sell their goods.

In *Colgate Palmolive (Zambia) Inc v. Abel Shemu Chuka and 110 Others*,[10] the court confirmed the principle of sanctity of contract and that parties are bound to any agreement they freely and voluntarily enter into. The Supreme Court was adamant that the court's role is to interpret the terms of the contract and not impose provisions that were not contemplated by the parties. This based on the principle of freedom of contract, where parties can enter into any contracts they wish, provided the terms are within the bounds of the law.

The main requirement is that the consideration must be sufficient, which means it must be real, tangible and have some actual value. The law does not concern itself with whether consideration is adequate in the circumstances. All they are concerned with is whether consideration has been given in exchange for a promise. This was confirmed in the case of *Finance Bank Zambia Limited v Socotec International Inspection Zambia Limited and Zambezi Oil and Transport Company Limited (in Receivership)*.[11]

The High Court deemed the contract illegal and void because it appeared inequitable. As outlined above, the law should not concern itself with a bad bargain and where a party enters into a disadvantageous contract, they shall be bound to the contract, even where the negotiated terms are not in their favour. The principles from the Abel Shemu Chuka case cited above apply – a party is bound to a contract they freely and voluntarily entered into.

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[8] SCZ Appeal No 162/2014.
[9] SCZ Appeal No. 47/2013.
[10] SCZ Appeal No. 181/2005
[11] (2010) ZR (2) 225.

It is also worth noting that the High Court substituted the interest rate agreed upon by the parties, with the minimum interest rate under the Money Lenders Act. Generally, it is not the role to make a contract for the parties. The role of the court is to interpret the contract. According to *Learned Authors of Ng'ambi and Chungu: Contract Law in Zambia* citing the case of *Ford v. Beech*[12] regarding construction of terms of a contract,

> An agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of agreement, and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. . . however if the words of a particular clause are clear and unambiguous, they cannot be modified by reference to other clauses in the agreement.

The above holding emphasises that it is the role of the court to interpret the provisions of the contract, rather than substitute the wording of the contract for what they feel is more equitable. The court's only power in this regard would be to strike down any provision in the contract that is contrary to the provisions of law, i.e., void or illegal. In such circumstances, as was done in the case of *Chainama Hills*, the court may substitute an agreed term, to bring it in line with the law.

In the circumstances of these facts at hand, section 15 (1) of the Money Lenders Act provides that: -

> (1) Where, in any proceedings in respect of any money lent by a money-lender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight per centum per annum, or the corresponding rate in respect of any other period, the court shall, unless the contrary is proved, presume for the purposes of section fourteen, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding forty-eight per centum per annum, is excessive. (Emphasis author's)

From the above, the court has the power to alter the interest charged on the parties where the interest on the principal sum exceeds 48% or where in the circumstances of the case, the interest which does not exceed 48% is still deemed excessive. It was thus not a misdirection on the part of the court to vary the interest charged.

Vitiating factors

As outlined above, apart from void and illegal contracts, a contract that signed between two or more parties can be set aside if a vitiating factor is present. A vitiating factor is one which negatives or adversely affects the consensus of the parties. It is worth mentioning that a contract is based on consensus by the parties to it. If the parties are not in full agreement as to the terms and conditions of the agreement, there isn't a binding legal contract between the parties.

For these reasons, anything that affects the 'meeting of the minds' of the parties will take precedence even where the contract is signed. Under Zambia, the following are the vitiating factors: -

[12] (1848) 11 QB 852

- Misrepresentation – which is a false statement of material fact made by one party to the contract, before the formation of the contract that was intended to form part of the contract and was relied upon by the innocent party.
- Mistake – where the parties to the contract make either the same or different mistakes about the nature or contents of the contract or where only one of the parties is mistaken and the other party knowingly takes advantage of this.
- Duress - where a contract has been procured by violence or threats of violence
- Undue influence - an equitable area where one party has been induced by coercion to enter a contract – it is a question of degree what level of persuasion is acceptable and what amounts to undue influence.
- Fraud – any unlawful or wrongful deception of another to gain a benefit.

Where one of the above is proven, the law guided that the signature of a party will not necessarily be binding. The contract will other be void, without legal effect from the beginning, or voidable, declared void at the insistence of the innocent party.
It is worth noting that this case is like the facts of the Supreme Court's decision in *Kalusha Bwalya v. Chadore Properties and Others*.[13] In that case, the Appellant, Kalusha Bwalya entered into a loan agreement with the Defendant, Chadore Properties Limited for the sum of US$26, 250. In terms of the agreement, Mr. Bwalya acknowledged receipt of the sum in exchange for the sale of his property, in the event of default of payment.

The Supreme Court guided that: -

> Likewise, if the record showed any evidence of duress, undue influence or unconscionability of the bargain, we would not hesitate to make the necessary pronouncements and orders. Having ourselves perused the entire record of the evidence that was tendered against the respondents, we are left in no doubt that the evidence not only led the trial Judge to the logical conclusion that the transaction was at arm's length, regardless of what the appellant said or thought, but also excluded the possibility that the appellant was fraudulently cajoled, or unlawfully coerced into signing the two documents, namely, the contract of sale, and the deed of assignment. We would be shirking in our judicial responsibility if we could, in the absence of clear evidence to that effect, foist bad faith and subterfuge on the part of the respondents in this transaction.

Based on the above, the Supreme Court held that Mr. Bwalya was bound to the contract as there was no evidence of any factor that vitiating his consent such as misrepresentation, mistake, or undue influence. The Supreme Court was clear that in absence of any illegality, a part who enters a contract can only escape its consequences if he proves one of the vitiating factors.

It was thus disappointing that the High Court did not abide by clear guidance from the Supreme Court. The High Court should have properly interrogated the facts of the case and the documents on record, to decide as to whether the Plaintiff, Eva Chiboni was tricked into entering the contract or was taken advantage of. In the absence of coherent proof relating to one of the vitiating factors, the High Court should not have held that there was duress.

[13] Selected Judgment No. 20 of 2015.

Following the decision in Eva Chiboni, the Court of Appeal dealt with a similar matter in the case of *Morton Mhango v. Jackson Kapobe.*[14] In that case, like Eva Chiboni, Mr. Mhango obtained of ZMW20, 000 and agreed to repay the debt with an interest of ZMW46, 000. Mr. Mhango agreed to surrender his certificate of title and the parties agreed that it would act as collateral for the loan. If Mr. Mhango failed to repay the loan in the agreed timeframe, the lender would be size ownership of the property. In that case, the Court of Appeal held that

> In the case at hand, it is not in dispute that the contract of sale was signed by the parties duly represented by Counsel from Messrs Peter M. Chamutangi and Company as representing both parties and a one-off transaction. The parties contend that this was done after the appellant failed to repay the debt. The appellant now contends that he signed the contract of sale under duress. This allegation appears to be an afterthought and the evidence in relation to the purported duress is inconsistent. The statement of claim indicates that the respondent made threats to the appellant's life, whereas in the evidence in chief, the appellant stated under oath that the respondent threatened to take him to the Riverside Police Station. The appellant did not speak of violence or threats to his life.

The Court of Appeal further stated that: -

> From assessment of the foregoing evidence, we have no reason to fault the lower Court's finding that the appellant had failed to demonstrate that he was under duress when signing the contract of sale. The Judge also found that there was no evidence suggesting that the appellant was threatened to surrender the certificate of title. The parties had some interactions in their dealings in the period between which the contract of sale was signed in June 2012 and the time the appellant wrote to the respondent affirming his commitment to paying the debt recommitting the certificate of title to the respondent. It is therefore a far-fetched notion to presuppose that the lower Court could have inferred any duress or coercion from the said circumstances.

From the above, the Court of Appeal followed the guidance from the Supreme Court that issues relating to duress must be pleaded and proven at court, through concrete evidence. In the absence of this, a contract cannot be voided on that basis.

As outlined above, where a person appends their signature to a document, they are deemed to know what its contents are. Generally, therefore, a person is bound by their signature to a document, whether they have read or understood the document.[15] However, if fraud or misrepresentation has been used to induce a person to sign a contractual document, the transaction will be voidable.

The above notwithstanding, the plea of *non est factum*, may be available to a party to a contract executed by mistake. The plea was originally used to protect illiterate and blind persons who were tricked into putting their mark on documents. A successful plea makes a document void. It eventually became available to literate persons who had signed a document believing it to be something totally different from what it was. It is a doctrine that operates only in respect of written agreements.

[14] CAZ Appeal No. 119 of 2020.
[15] *L'Estrange v Graucob* [1934] 2 KB 394.

Put differently, the principle in *L'Estrange v Graucob*[16] applies and a party is bound by written agreements that they have signed, unless a party can claim that they signed something radically, fundamentally, or materially different.

The House of Lords decision of *Saunders v Anglia Building Society (Gallie v Lee)*[17] is the leading case on this topic. Mrs Gallie, a 78-year-old woman, signed a document which her nephew's friend, Lee, told her was a deed gifting the house to her nephew. She did not read the document, as she had broken her spectacles. The document was in fact a deed assignment assigning her leasehold to Lee. Lee mortgaged the interest in the house to a building society; on default, the building society brought an action for possession. Mrs Gallie sued for a declaration that the deed was void and for the recovery of the title deeds. When she died, the action was taken over by her executrix, Saunders.

From the facts of the case above, the House of Lords had two competing interests. On the one hand, there is the injustice of holding the widow to an agreement to which she had not brought a consenting mind; but on the other hand, there is the need to protect the building society which had innocently relied to its detriment upon the widow's signature.

The House of Lords gave greater weight to the latter policy and held that the defence of *non est factum* was not made out on the facts of the case. The House of Lords held that *non est factum* did not apply as there was insufficient difference between the documents that she did sign and had intended to sign. Both gave up her rights to the property and she had not done enough to check its nature.

In Foster *v MacKinnon*[18] the plaintiff, as endorsee of a bill of exchange worth £3 000, sued the defendant, the alleged endorser of the same. The defendant, a man advanced in years and had poor sight, signed the bill of exchange, having only been shown the back of the document, after being told it was a guarantee like one, he had signed previously. The court ruled in favour of the defendant. Byles J stated:

> It seems plain, on principle and on authority, that if a blind man, or a man who cannot read, or who, for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading it to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then at least if there be no negligence, the signature obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, he never intended to sign and therefore, in contemplation of law, never did sign the contract to which his name is appended. In the present case … he was deceived, not merely as to the legal effect, but as to the actual contents of the instrument.

Therefore, in some circumstances a party can claim that they only signed because of a genuine mistake as to the nature of the document signed.

The doctrine is subject to strict requirements. It will only be appropriate because the party signing is subject to some weakness that has been exploited by the other party, for instance

[16] [1934] 2 KB 394.
[17] [1970] 3 All ER 961.
[18] (1869) LR 4 CP 704.

blindness or senility. Also, the other party must have represented that the document is something different than that which has been signed. If this is so and the party signing has taken the precautions available to check on the authenticity of the document before signing, then the contract is void. However, before the court will declare the contract void it must be satisfied that the document is of a kind materially different to what it was represented to be, and that the party has not been negligent in signing it.

The use of the rule in modern times has been restricted. For a successful plea of *non est factum*, two factors must be established. First, it must be established that the signer was not careless in signing. Secondly, it must be shown that there is a radical difference between the document which was signed and what the signer thought they were signing.

The case of *Lloyds Bank PLC v. Waterhouse*[19] should also be noted. In that case Lloyds Bank obtained a guarantee from a father as security for a loan to his son. The father was illiterate, which the bank did not know, but he did ask what the extent was of guarantee and concluded that it covered the mortgage on his son's farm only. In fact, it was worded to guarantee all the son's indebtedness to the bank. The son defaulted and the bank sought to recover the full debts, less the amount realized by the sale of the farm. It was held that the father had not been careless and had been led into signing something more than what he believed.

The House of Lords held that the plea of *non est factum* can only rarely be established by a person of full capacity and that, although it is not confined to the blind and illiterate, any extension of the scope of the plea would be kept within narrow limits. It is unlikely that the plea would be available to a person who signed a document without informing themselves of its meaning.

The law of contract is premised on the fact that a party is deemed to have read and understood the contents of a document prior to signing it. They therefore cannot go back and claim mistake, fraud, or misrepresentation. Therefore, if the document is a negotiable instrument, the plea of non est factum can only be used if the signer of the document has not been negligent. In the *Foster v. Mackinnon* case, Mackinnon was not negligent as he had poor sight and was advanced in age.

Where a defendant signed a guarantee without reading it but was told it was a paper concerning some insurance matter, the defendant, even though he had been negligent, will not be held liable. In *Carlisle and Cumberland Banking Co. v. Bragg*,[20] Bragg was fraudulently induced to sign a document by R and was told that it was an insurance paper. In fact, it was a guarantee of R's overdraft at the bank. Bragg did not bother to read the document and did not know it was a guarantee, and not a negotiable instrument. R obtained an overdraft on the guarantee from the bank. The bank later sued Bragg as he had signed the guarantee. It was held that Bragg was not liable on the guarantee.

However, where a person knows the nature of the document he signs, but is mistaken as to the contents, the contract is not avoided. In *Howatson v. Webb*,[21] Webb, who was a lawyer, was asked to execute and did so on being told that it was a conveyance of property of which he was a trustee. The deed was in fact a mortgage of the property. Webb was subsequently sued on the mortgage. It was held that Webb was bound by the terms of the mortgage.

[19] (1993) 2 FLR 97.
[20] (1911) 1 KB 489.
[21] (1907) 1 Ch 537.

The above can be compared to the Court of Appeal case of *Pulse Financial Services Limited (t/a Entrepreneurs Financial Centre) v. Elaine Munga, Justine Mpundu and Ernest Phiri*[22] *where* Elaine Munga intentionally deceived Justine Mpundu as she sought to by Justine Mpundu's property but informed her that to finance the purchase of the property, she needed to obtain a mortgage from Pulse Finance Services Limited. She was coerced into pledging her property as security for the loan.

In the *Elaine Munga* case, the defence of *non est factum* could not be pleaded because there was not a mistaken belief in the nature of the document being signed. The court did hold that Justine Mpundu was not bound to the contract due to the misrepresentation and the failure of Pulse Financial Services to explain the agreement. This was the case based on the evidence and proof and presented.

In summary, *non est factum* entails mistake concerning the nature of the document being signed. The document is one materially different to what it was represented to be and there is no negligence by the person signing it. The legal consequences are if both are present, then there is an operative mistake and the contract is void – but if not, then there is no effect on the contract. This entails asking three questions, namely: -

1. **To whom is the plea available?** – the non est factum doctrine is not confined to the blind or illiterate but also extends to those 'who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding or purport of a particular document, whether that be from defective education, illness, or innate incapacity. It may apply to those with capacity as well in exceptional circumstances, but not those who are too lazy or too busy to read the document.

2. **For what type of mistake is the defence available?** – the answer here is simple. The doctrine of non est factum applies where the documents signed is radically, fundamentally, substantively, or materially different to the document one intended to sign.

3. Thirdly, **the court should ask in what circumstances a person is precluded from relying on non est factum**. The principal circumstance in which the defence is not available arises where there is carelessness on the part of the person who signs the document.
4.

Applying the tests above, it would be prudent to apply these to the circumstances involving Eva Chiboni. Applying the first test, the *non est factum* may have applied to her as she was a person who was unable to understand the terms of the contract, due to no fault of her own. However, the facts of the case inform us that her son, reviewed the contract and was able to understand its contents, to the extent that he even queried the provision relating to sale of the property.

The above means that following being given an understanding the nature of the contract following explanation by her son, she proceeded to sign the contract following the assurance that it was a 'formality'. As outlined above, in the absence of duress, undue influence, mistake or misrepresentation, the signature by Ms. Chiboni is binding. She could not rely on non est

[22] CAZ Appeal No. 133/2019.

factum as she gained an understanding of the nature of the contract and proceeded to sign, notwithstanding it being characterised as a 'mere formality'.

If one were to apply the second criterion, Ms. Chiboni would equally not apply. According to the case of *Sanders*, *non est factum* only applies where the contract being signed in fundamentally different to what you intended to sign. Applying the facts from *Sanders*, Ms. Eva Chiboni knew the nature of the contract was to sell her property if she defaulted on the loan. In fact, she handed over her certificate of title voluntarily knowing the implications. Therefore, she would not have succeeded even on the second criterion.

Lastly, Eva Chiboni acted carelessly, and the law does not protect those who were careless. Despite getting to understand from her son, she still signed a contract knowing the effect of the same. Had she not been sure, she could have equally approached a legal practitioner or the Legal Aid office to get assistance. The failure to do this amounts to negligence and the court should have held that she was not entitled to avoid the contract.

Conclusion

The decision in *Eva Chiboni* has been seen by some as a victory for vulnerable groups of people in Zambia, compared to bigger entities that do at time take advantage of parties with less bargaining powers. However, as this article has demonstrated, it reached an outcome not supported by principles of law, particularly those relating to the need to provide lucid and clear evidence of a vitiating factor or illegality to declare a contract null and void.