REPORTABLE ZLR (9)

Judgment No S.C. 16\2002
Civil Appeal No 47\2001

FOODEX (PRIVATE) LIMITED v CLIMAX INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & SANDURA JA
HARARE JANUARY 29 & APRIL 12, 2002

R.M. Fitches, for the appellant

P. Nherere, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which ordered the appellant to pay to the respondent the sum of $40 476.45 together with interest and costs of suit. The summons had been issued against the appellant by the Zimbabwe Banking Corporation Limited ("Zimbank"), but Zimbank subsequently ceded its rights to the respondent.

The relevant facts are as follows. The appellant had a letter of credit facility at the international division of Zimbank which facilitated the importation of various goods into the country by the appellant. In addition, the appellant had a current account at the Angwa Street branch of Zimbank.

In 1995 the appellant, intending to import certain goods from Morocco, applied for a letter of credit from the international division of Zimbank. The application was successful and the letter of credit was issued. It was a ninety day letter of credit.

However, when payment of the amount due in respect of the letter of credit was not made at the international division of Zimbank within the ninety day period, Zimbank debited the amount due to the appellant's current account at its Angwa Street branch. As a result, the appellant's current account was overdrawn, and Zimbank charged interest at the punitive rate of 43% per annum due to the fact that the overdraft was unauthorised.

When the appellant failed to clear the overdraft, Zimbank issued a summons against it, but subsequently ceded its rights in the action to the respondent.

Thereafter, when the matter was heard, the learned judge in the court *a quo* ordered the appellant to pay to the respondent the sum claimed together with interest and costs of suit. Aggrieved by that decision, the appellant appealed to this Court.

The first issue which I should consider is whether Zimbank had the right to transfer the sum owing in respect of the letter of credit to the appellant's current account at its Angwa Street branch. I think it had. I say so partly because of the contents of a document produced at the trial by the respondent, and partly because of the appellant's conduct after the account had been debited. The document is a

standard application form which is completed by a person applying for a letter of credit.

The relevant part of one of the clauses in that document reads as follows:

> "Whenever the Bank in its sole discretion considers it desirable to obtain cash cover against this Letter of Credit, the Bank is hereby irrevocably authorised to debit our account, without reference to us, with the amount concerned …"

In my view, the wording of this clause is clear and unambiguous. The clause clearly authorised Zimbank to debit the appellant's current account at its Angwa Street branch, as it was not suggested by the appellant that the international division of Zimbank operated ordinary customer accounts. That division was responsible for issuing and administering letters of credit.

In the circumstances, the phrase "our account" could only mean the appellant's account at some other branch of Zimbank, i.e., in this case, the Angwa Street branch.

Whilst it is correct that the document in question was not the actual form completed by the appellant's Managing Director when he applied for the Morocco letter of credit in 1995, but was the form completed by him when he applied for a different letter of credit in October 1994, the document was produced as the standard application form to be completed by any applicant for a letter of credit. In my view, the learned judge in the court *a quo* was correct when he concluded that on

a balance of probabilities the appellant's Managing Director completed an identical application form when he applied for the Morocco letter of credit in 1995.

In any event, when the document was produced in the court *a quo* the appellant's Managing Director did not allege that the document was not identical to the application form which he had completed in 1995 when he applied for the Morocco letter of credit.

However, Mr *Fitches*, who appeared for the appellant, submitted that in view of the fact that the document in question had not been discovered, the learned judge in the court *a quo* ought to have made an appropriate order as to costs, i.e. by depriving the respondent of part of its costs. In this regard, it is pertinent to note that this argument was not advanced in the court *a quo*.

Had the argument been advanced, the learned judge would have considered it and exercised his discretion in the matter. As the question of costs is a matter which lies within the discretion of the trial judge, this court is not in a position to substitute its own discretion and there is no basis for doing so. In any event, the issue was not raised in the court below.

Furthermore, in my view the learned judge could have reached the conclusion which he reached without taking into account the document in question because the appellant's conduct, after its current account had been debited, clearly showed that it accepted that Zimbank was perfectly entitled to transfer the debit in respect of the letter of credit to its current account at the bank's Angwa Street branch.

This emerges from the correspondence between the Angwa Street branch of Zimbank and the appellant, after the appellant's current account had been debited.

On 28 December 1995 the Senior Manager of the Angwa Street branch of Zimbank wrote to the appellant as follows:-

> "The above account is overdrawn by $396 898 after meeting the Letter of Credit drawing in the amount of $460 984.92.
>
> We enclose herewith acknowledgement of debt forms for your signature… Kindly return these to us for the completion of our records. We however, expect the above overdraft to be repaid now since no prior arrangements with ourselves for accommodation had been made."

On 8 January 1996, the appellant's Managing Director replied as follows:-

> "Reference is made to your letter and annexures of 28th December 1995 received by this office on the 5th January 1996 …
>
> As indicated to you telephonically prior to the date of this letter, in early December I offered to Zimbank after discussions with your Mr Visser, a further guarantee of ZWD 1 million on a property belonging to me through another company. The obvious idea behind my move … was that your bank would have given our group substantial assistance so as to get us through the serious cash flow problems which we were experiencing as a result of a negative trading pattern during September and October last year …
>
> Under the circumstances therefore, you would appreciate that I am not willing at this present stage to give any more guarantees in my personal capacity or otherwise and as a result regret to advise that I am not prepared to sign the acknowledgement of debt forms …
>
> Obviously every effort will be made for this account to return to a credit state as soon as humanly possible…
>
> We do apologise for the obvious difficulties that we are causing you as a result of this overdrawn account …"

It is significant that the appellant's Managing Director did not protest that the appellant's current account at the Angwa Street branch had been debited with the amount payable in respect of the letter of credit without authority. Had the account been debited without authority the Managing Director would obviously have protested.

Subsequently, on 18 June 1996, Zimbank's lawyers wrote to the appellant demanding payment of the full amount owing in respect of the overdraft. In his reply a week later, the appellant's Managing Director, whilst querying the punitive rate of interest charged by Zimbank, did not protest that the account should not have been debited with the amount payable in respect of the letter of credit.

In the circumstances, I am satisfied that the learned judge in the court *a quo* correctly found that the appellant's current account was debited with the appellant's authority.

I now proceed to consider whether Zimbank was entitled to charge interest on the appellant's overdraft at the punitive rate of 43% per annum.

There can be no doubt in my mind that the appellant's overdraft was unauthorised and that Zimbank was, therefore, entitled to charge interest on the overdraft at the punitive rate, which was higher than the rate of 30% per annum which the appellant thought should have been charged.

In this regard, clauses 4 and 5 of Zimbank's General Terms and Conditions applicable to overdrafts read as follows:-

> "4. The rate of interest and the basis upon which interest is calculated or charged may be altered by the Bank from time to time and as it, in its discretion, deems fit.
>
> 5. A penalty charge of not less than an additional 4% is levied in respect of any unauthorised excesses over the agreed limit. Plus 10% of the excess interest as management fees."

Although there was no express agreement as to the rate of interest chargeable on the appellant's overdraft it was common cause that interest was chargeable. The issue was whether it should be charged at the rate of 30% per annum or at the punitive rate of 43% per annum.

However, in terms of clause 5 of Zimbank's General Terms and Conditions applicable to overdrafts, it is clear that the bank was entitled to charge interest at the punitive rate of 43% in respect of unauthorised overdrafts. As the appellant's overdraft was unauthorised, the punitive rate of interest charged by the bank on such overdrafts applied to it.

In addition, the appellant was bound by Zimbank's practice of periodically debiting, as money due and payable, interest on an overdrawn account.

Dealing with a similar issue in *Senekal v Trust Bank of Africa Limited* 1978 (3) SA 375 (A) MILLER JA had this to say at 384F-H:-

> "Ordinarily, the customer is probably aware of the bank's practice of periodically debiting, as money due and payable, interest to an overdrawn current account and, if the customer may have been unaware of that practice at the time of his seeking and obtaining overdraft facilities, he must needs have become aware of it when periodical statements of account were rendered to him by the bank, showing that interest had been periodically charged and added to his current capital account. It appears to me that a customer who receives such periodical statements without protest or objection acquiesces in the system and thereby tacitly agrees to be bound thereby. This view has been taken by Courts in England. (See *Paget* The Law of Banking 8th ed at 132-4 and the cases there referred to). Another approach, leading to the same result, is that, in the absence of any express agreement on the point, the customer, when seeking and obtaining overdraft facilities from his banker, tacitly agrees to be bound by the practice of the bank in regard to the debiting of accrued but unpaid interest to capital account. The evidence of Burger clearly reveals that the respondent's practice was to debit unpaid interest to the current account at periodical intervals of approximately one month and, indeed, he testified that that is and has for very many years been the common practice of commercial banks in South Africa."

This was followed in *Absa Bank Bpk v Saunders* 1997 (2) SA 192 (NC) where, according to the translation, STEENKAMP AJP said the following at 196J-197A:-

> "According to Mr Fourie's evidence, which was not disputed, a long-standing trade usage exists that it is within the discretion of the bank manager to determine the interest rate on an overdrawn account and that it was unnecessary for the commercial bank to notify its client of the increase or decrease in interest."

In my view, these *dicta* are very persuasive authority in favour of Zimbank and the respondent.

The learned judge in the court *a quo*, therefore, correctly determined the issue concerning the punitive rate of interest charged by Zimbank on the appellant's overdraft.

Finally, I wish to consider the date from which interest should be charged on the difference between the sum of $28 540.00, originally claimed in the summons, and the sum of $40 476.45 claimed in the amended summons. The difference between the two sums is $11 936.45.

Whilst it was common cause that demand for payment of the sum of $28 540 had been made by the respondent, there was no agreement on whether payment of the sum of $40 476,45 had been demanded.

On 8 December 1999 the appellant filed its request for further and better particulars in the High Court. One of the further and better particulars sought was the following:-

> "When was the demand made of the sum of $40 456.45?"

In reply, the respondent, in its further and better particulars filed in the High Court on 8 March 2000, stated as follows:-

> "Demand of the sum of $40 456.45 was made by the Notice of Amendment filed in this matter on the 1st September 1999."

The Notice of Amendment referred to stated the following:-

> "Please take note that (at) the Pre-Trial Conference of this matter plaintiff will apply for amendment of its summons by the deletion of paragraphs 1 and 2 and substitution (of) the following …"

However, the Pre-Trial Conference minute filed of record does not indicate whether the application for the amendment of the summons was made at the Pre-Trial Conference and what the result was.

Nevertheless, it is clear from the record that the trial proceeded on the basis that the respondent's claim was in respect of the sum of $40 476.45. This was mentioned by counsel who appeared for the respondent in the court *a quo* before she called her first witness.

In the circumstances, I agree with Mr *Fitches*, who appeared for the appellant, that the learned judge in the court *a quo* should have ordered interest on the sum of $11 936.45 to run from the date of the judgment, i.e. 1 February 2001.

In my view, a notice of amendment of the summons cannot be a demand in the true sense of the word. As Mr *Fitches* submitted, the significance of a demand is to put the defaulting party in *mora*, and it is from that date that interest should run.

In the circumstances, the order of the court *a quo* is altered so that it reads as follows:-

"1. That the defendant shall pay to the plaintiff the sum of $40 476.45.

2. That interest on the sum of $28 540.00 shall be calculated at the rate of 43% per annum from 29 October 1996 to the date of payment in full,

compounded monthly on the last day of each month from 31 October 1996.

3. That interest on the sum of $11 936.45 shall be calculated at the rate of 43% per annum from 1 February 2001 to the date of payment in full, compounded monthly on the last day of each month from 28 February 2001.

4. That the defendant shall pay the costs of suit."

Subject to the above alteration, the appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree

EBRAHIM JA: I agree

Lofty & Fraser, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners