CAPITAL ALLIANCE (PRIVATE) LIMITED
versus
RENAISSANCE MERCHANT BANK LIMITED
and
RENAISSANCE FINANCIAL HOLDINGS LIMITED
and
RENAISSANCE SECURITIES NOMINEES (2) (PRIVATE) LIMITED
and
NEW AFRICA SECURITIES NOMINEES (12) (PRIVATE) LIMITED
and
FIRST TRANSFER SECRETARIES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 12 July and 23 October 2006

Opposed Application

Mr. Manikai, for the applicant
Mr. Chinake, for the respondents

PATEL J: The applicant in this matter seeks an order for the transfer of certain shares in First Mutual Limited (FML) from the respondents to the applicant. It also seeks a declaratory order to the effect, *inter alia*, that its tender of $15.6 billion to the 1st respondent in November 2005 was proper and valid and that it fully extinguished its indebtedness to the respondents and to ENG Capital (Private) Limited (ENG).

The Facts

In November 2003, the applicant acquired 840,000,000 ordinary shares in FML. In order to finance the cost of this acquisition, the applicant entered into a syndicated loan arrangement with several parties. The applicant borrowed a total of $29.8 billion from the lenders, including ENG and the 1st respondent. The loan debt was secured through the issue of redeemable debentures and cumulative preference shares as well as the pledge of the FML shares to the lenders in proportion to the amounts owed to each one of them. The security arrangements were consolidated and formalised through a Security Sharing Agreement, a Debenture Trust Deed and a Preference Share Scheme Agreement. The 1st respondent was constituted the Trustee,

to act on behalf of all the lenders, for the purpose of administering the security arrangements.

In 2004 the applicant found itself unable to declare any dividend or pay any interest on the preference shares and debentures. Subsequently, a dispute arose between the applicant and the lenders as to the satisfaction of the former's indebtedness to the latter. After several meetings and negotiations, the matter was largely resolved through the conclusion of a Settlement and Transfer Agreement in September 2005. This agreement excluded ENG and its claim against the Applicant.

In October 2005, the 1st and 2nd respondents entered into an agreement with the liquidator of ENG for the cession of his rights in the ENG debt, the ENG debenture and the 112,000,000 FML shares pledged to ENG. Thereafter, in November 2005, the 1st and 2nd respondents transferred these FML shares to the 3rd and 4th respondents and requested the 5th respondent to register the transfers.

The applicant contends that the 1st and 2nd respondents did not have any right under the original agreements to appropriate and transfer the FML shares in question. The applicant further contends that its tender in November 2005 in settlement of the ENG debt constituted a proper discharge of that debt and that, therefore, the FML shares in question should be released from pledge and returned to the applicant. The respondents dispute these contentions and assert that the applicant has been lawfully divested of its rights in the FML shares in satisfaction of the ENG debt ceded to the 1st and 2nd respondents.

Preliminary Matters

In their opposing papers, the respondents raised four preliminary objections to the applicant's claims. At the hearing of this matter, *Mr. Chinake* for the respondents withdrew two of those objections (pertaining to the *locus standi* of the applicant's deponent and the validity of its cause of action against the 1st respondent) and confined himself to the principal points relating to non-joinder and jurisdiction.

As regards non-joinder, *Mr. Chinake* contends that because the present dispute concerns the ENG debt and the manner in which it was to be settled as well as the validity of the cession of the ENG liquidator's rights, the liquidator should have been joined as a party to these proceedings. As to the question of jurisdiction, he submits

that the issues *in casu* involve a dispute that is referable to arbitration in terms of the Debenture Trust Deed and, as such, they cannot be entertained by the Court.

For the applicant, *Mr. Manikai* submits that the ENG liquidator has no interest in the present matter because he has received full consideration for the ENG debentures. As for jurisdiction, he argues that the present dispute does not arise from the Debenture Trust Deed but relates to the applicant's ownership of the FML shares in question and that, therefore, the dispute falls outside the arbitration clause incorporated in the Deed.

Material Non-joinder

Rule 87(1) of the High Court Rules 1971 provides as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues and questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

In *Henry Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151, it was affirmed that a party who has a direct or substantial interest in the result of any litigation and whose interests might be prejudicially affected thereby must be afforded the opportunity to be joined as a party thereto. And in *Abrahamse and Others v Cape Town City Council* 1954 (2) SA 178, at 182-3, the failure to join a contracting party who had a direct, substantial and financial interest in the matter was held to be fatal to the success of the application concerned and resulted in the dismissal of the applicant's appeal.

In casu it is common cause that the ENG liquidator was a party to the original loan arrangement. There is also no doubt that the settlement of the ENG debt and the validity of its cession to the 1st and 2nd respondents are part of the issues presently in dispute. In the event that the FML shares in contention are restored to the applicant pursuant to the order that it seeks, the 1st respondent is likely seek recompense from the ENG liquidator. It seems fairly clear, therefore, that the ENG liquidator has a direct and substantial interest in this matter and that he might be prejudiced by the granting of an order in favour of the applicant. It follows that he should have been joined as a party to these proceedings.

In any event, it seems to me that the failure to join the ENG liquidator *in casu* is not necessarily fatal to the present application. The decision in the *Abrahamse* case, *supra*, is clearly distinguishable in that the application in that matter had already been determined and the non-joinder there was held to be fatal at the appeal stage. There is no basis in our Rules, as I read them, to warrant the striking out of a matter for material non-joinder in every case. On the contrary, Rule 87(1) appears to enjoin quite the opposite result. The application here has yet to be determined and there is nothing peculiar in this matter to preclude the joinder of the ENG liquidator at this juncture. That indeed is the course of action specifically contemplated by Rule 87(2) which expressly allows the Court, either of its own motion or on application, to order the joinder of a party whose presence is necessary to ensure the effectual and complete adjudication of all the matters in dispute.

As I have already intimated, the ENG liquidator should be joined as a party herein and that is the course that ought to be followed if the matter is to proceed further on the merits. However, the failure to join the liquidator from the outset does not, in my view, justify the dismissal of this application *in limine*.

Reference to Arbitration

Article 8(1) of the Model Law (viz. the First Schedule to the Arbitration Act [*Chapter 7:15*]) codifies and restates the common law on arbitral agreements as follows:

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

In *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd* 1999 (2) ZLR 448 (H), it was held that a clause in a contract to refer a dispute to arbitration is binding on the parties and a party is not at liberty to revoke this clause at any time if he wishes to do so. In *PTA Bank v Elanne (Pvt) Ltd & Ors* 2000 (1) ZLR 156 (H), it was observed that the question of whether a dispute fell within the arbitration clause in an agreement was primarily a question of interpretation of the agreement and the arbitration clause. Once it is established that the dispute falls within the ambit of the

arbitration clause, the onus to show why court proceedings should not be stayed falls on the party challenging the reference to arbitration. See *Independence Mining (Pvt) Ltd v Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268 (HC) at 272.

As to the approach to be applied in interpreting an arbitration clause, it is instructive to consider the decision in *Bitumat Ltd v Multicom Ltd* 2000 (1) ZLR 637 (H), at 639-40, where SMITH J stated as follows:

> "In my opinion, where parties have entered into an agreement which contains an arbitration clause that is clearly intended to be widely cast, the court should not be astute in trying to reduce the ambit of the arbitration clause. Where an arbitration clause exists in any such agreement, the court is required to give effect thereto — see Article 8(1) of the UNCITRAL Model Law which was adopted as part of our law by the Arbitration Act 6 of 1996 and *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H). It may well be that at some stage after a dispute has arisen, because of changed circumstances, the parties concerned agree that the matter should be determined by a court of law, rather than by arbitration in terms of the agreement in question. In these circumstances, the decision of the parties to abandon the arbitration clause in their agreement must be specific and clearly evidenced. It cannot be implied by the conduct of, or correspondence between the parties — it must be explicit. After all, if the arbitration clause is contained in a written agreement, then the decision to change the agreement must either be in writing or else so clearly evidenced by the conduct of the parties that there is no room for doubt."

In the present case, clause 11 of the Security Sharing Agreement provides that any dispute between the lenders amongst themselves should, if it cannot be resolved within 21 days, be referred to arbitration in terms of a written agreement and may, failing such agreement, be dealt with by litigation in a court of competent jurisdiction. What is more germane, for present purposes, is clause 14.1.1 of the Debenture Trust Deed which stipulates as follows:

> "Any dispute (other than where an interdict is sought) arising out of or pursuant to the provisions of this Trust Deed, including, but not limited to, the interpretation, application and/or effect of any of its terms, conditions or restrictions imposed, or any procedure to be followed under this Trust Deed and/or arising out of or pursuant to the termination or cancellation of this Trust Deed or any provision thereof, will be referred to an expert in accordance with the provisions of this clause 14.1."

Turning to the dispute *in casu*, the papers indicate that it arose in the following circumstances. Following the applicant's failure to fulfil its obligations under the

Debenture Trust Deed and the Preference Share Scheme Agreement, the 1st respondent, through its lawyers, wrote a letter to the applicant's directors on the 21st of June 2006. The letter indicated that the applicant had failed or neglected to meet the terms of payment timeously and was consequently in breach of the instruments constituting its indebtedness. More significantly, the 1st respondent, as Trustee and acting in the interests of the ENG liquidator, gave notice to the applicant, in terms of clause 10.5.1.4 of the Debenture Trust Deed, to remedy its breach within 14 days. Thereafter, the 1st respondent convened a meeting of all the lenders on the 19th of July 2005 and was authorised to issue a further demand on their behalf. This was duly effected through a second letter written by the 1st respondent's lawyers to the applicant on the 21st of July 2005. This letter, written on behalf of all the lenders, including the ENG liquidator, presented a final demand in terms of clause 10.5.3.1 of the Debenture Trust Deed for the capital and dividends due to the lenders.

The lenders were then convened again on the 2nd of September 2005. At that meeting, they rejected the applicant's proposal for settlement and resolved to enforce their rights by retaining their FML shares in settlement of their respective claims. Eventually, the Settlement and Transfer Agreement was negotiated and concluded on the 23rd of September 2005. As already indicated, this agreement apparently excluded the ENG debt and the 112,000,000 FML shares pledged to and held by the ENG liquidator. In October 2005, the ENG liquidator ceded his rights in the ENG debt, the ENG debenture and the FML shares to the 1st and 2nd respondents who later transferred these FML shares to the 3rd and 4th respondents. The applicant now challenges the legality of the appropriation and transfer of those shares by and to the respondents.

On behalf of the applicant, it is argued that the present dispute relates to the ownership and vindication of the FML shares transferred by the 1st respondent. The Debenture Trust Deed deals with the debentures and the security therefor, including the pledged FML shares, but not with the ownership of those shares. The appropriation and transfer of those shares by the respondents, so it is argued, was unlawful and falls outside the purview of the Debenture Trust Deed.

The applicant's argument, taken from all possible angles and embracing all of its supposed subtleties, is one that I find extremely difficult to comprehend. Its

attempt to differentiate between the debentures forming the subject-matter of the ENG debt and its underlying security in the form of the FML shares is, in my view, as factually spurious as it is legally untenable.

In clause 1.1.21 of the Debenture Trust Deed, the term "Security" is defined to mean the applicant's FML shares and any additional or substituted security given under the Deed. It is quite clear, not only from this definition but from the entire loan arrangement between the parties, that the debentures issued to the lenders by the applicant were worthless unless they were secured by the applicant's FML shares. The debentures and the FML shares pledged as security therefor were practically intertwined and they cannot be legally separated for the purpose of interpreting and applying the Debenture Trust Deed.

This necessary linkage is further borne out by the declaratory order sought by the applicant, viz. that its tender in settlement in November 2003 fully extinguished its indebtedness under the Debenture Trust Deed to ENG and the 2nd respondent as the current holder of the ENG debenture, that the ENG debenture was fully redeemed upon such tender and that, therefore, the FML shares in dispute are no longer the subject of the pledge constituted in terms of the Debenture Trust Deed.

As for the principal relief that it seeks, the applicant questions the 1st and 2nd respondents' actions in appropriating and transferring the FML shares. In effect, the applicant challenges the lawfulness of their conduct purporting to enforce their rights in respect of their claims against the applicant pursuant to the provisions of the Debenture Trust Deed. The applicant's contention, in essence, is that the respondents failed to abide by the terms of the Debenture Trust Deed and its concomitant security arrangements.

It is abundantly clear from the foregoing that the material facets of the present matter relate to the interpretation and application of the terms and conditions of the Debenture Trust Deed. The issues in dispute between the parties undoubtedly arise out of and pursuant to the provisions of the Deed and therefore fall squarely within the scope of its arbitration clause.

The applicant does not contend and there is nothing before the Court to suggest that the agreement of the parties to submit to arbitration is null and void, inoperative or incapable of being performed. Accordingly, the dispute *in casu* is one

that must be referred to an expert for arbitration in conformity with the provisions of the Deed.

It follows that the respondents' preliminary objection relating to the jurisdiction of this Court to entertain this application is sustained. In accordance with Article 8(1) of the Model Law, the proceedings herein are stayed and the parties are referred to arbitration in terms of clause 14.1.1 of the Debenture Trust Deed.

As regards costs, although the respondents' papers seek costs on the higher scale, no argument was presented to the Court in this regard at the hearing of this matter. In the absence of any specific reason for adopting that course, I am disinclined to make an award of punitive costs. In the result, the present application is dismissed with costs on the ordinary scale.

Dube, Manikai & Hwacha, applicant's legal practitioners
Kantor & Immerman, respondents' legal practitioners