TRUST BANK CORPORATION LIMITED
versus
COLD STORAGE COMPANY LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE: 9 April 2008

Prof. *W Ncube*, for applicant
Mr *S. Hwacha*, for respondent

MTSHIYA J: This is an opposed application for summary judgment wherein the applicant prays for judgment in the sum of US$1 514 762-20.

It is common cause that following a credit facility agreement dated 22 April 2004, the applicant offered the respondent an offshore loan facility of US$1 514 762-20. The repayment plan was agreed as follows.

> "REPAYMENT PLAN
>
> (a) An initial instalment of a minimum of USD 25 000 is to be paid by 30 June 2004.
>
> (b) Thereafter quarterly repayments of a minimum of USD 60 000 are to be effected until 31 March 2005.
>
> (c) This repayment plain is to be reviewed at the end of 6 months from the date of this letter – vis 31 October 2004.
>
> (d) Notwithstanding the provisions in a,b and c, the outstanding amount remains due and payable on demand a the Banks discretion".

As at 29 March 2005, the whole loan amount was still outstanding and thus prompting the issuance of a summons with the following claim:- 'payment of the sum of US$1 514 762-00 due and payable in respect of money lent and advanced at your specific instance and request, with interest thereon at the rate of 5% per annum, converted into Zimbabwe dollars as at the date of payment, and Collection commission calculated in accordance with By Law 70 of the Law Society of Zimbabwe By Law 1982; and Costs of suit on the legal practitioner and client scale to the extent that such costs are permitted in proviso (iii) to By Law 70(2) of the Law Society of Zimbabwe By Laws'.

On 24 May 2005 the respondent filed a notice of appearance to defend.

On 23 June 2005 the respondent filed a request for further particulars. In response to the request for further particulars, on 2 November 2005 the applicant forwarded a copy of the credit facility Agreement to the respondent. That did not excite any response from the respondent.

On 22 May 2006 the applicant filed this application for summary judgment. In its founding affidavit, sworn to by Collins Chikukwa a Manager Advances (Recoveries Unit) (Chikukwa) in the Zimbabwe Allied Bank Group Limited (ZABG), the applicant stated that the respondent had no *bona fide* defence to the action/claim and had indeed accepted its indebtedness in the amount stated in the summons. However, notwithstanding its undertaking to pay the amount, the respondent had not made any payment whatsoever-hence the justification for summary judgment.

On 7 June 2006 the respondent filed a notice of opposition to this application. Its opposing affidavit was sworn to by its Administration Manager, Mr R.D. Chagwinya, who stated, in part;

> "In opposition, it my respectful view that the application has been brought by the wrong party. As is clear from paragraph 1 of the affidavit sworn to by Mr Collins Chikukwa, he is the Manager Advances (Recoveries Unit) of the Zimbabwe Allied Banking Group (ZABG). The Zimbabwe Allied Banking Group (ZABG) is a banking institution registered and licensed in its own right.
>
> I annex marked 'A' a copy of an agreement entered into between the Curator Trust Bank in which the said Curator surrendered to Zimbabwe Allied Banking Group all claims including the claim in this matter. On this basis, I respectfully believe that the summons and or this application for summary judgment could only be brought by the Zimbabwe Allied Banking Group.
>
> On the basis of this preliminary point, I pray that the application be dismissed with costs"

In its Heads of Argument the applicant maintained that the respondent had no defence to its claim. It argued that the respondent had entered an appearance to defend only for purposes of delay.

Relying on the case of *Barme Mara*is *& Seuns v Eli Lilly* 1995 (SA) 469, the applicant argued that it (applicant) could as cedent lawfully institute action for the recovery of the loan. At page 8 of its Heads of Argument, the applicant went on to argue as follows:-

> "In this instance, Trust Bank Corporation Limited is under Curatorship. It ceded various rights and obligations to Zimbabwe Allied Banking Group Limited, including the claim against respondent. In terms of the agreement between Trust Bank

> Corporation Limited and Zimbabwe Allied Banking Group Limited, Trust Bank and its curator have pursued some litigation to recover various sums due, as agents of Zimbabwe Allied Banking Group Limited, and handed over the amounts due to the latter in terms of the cession agreement. This is permissible, as confirmed in the judgment of the court in the Barrie Marais case."

It was applicant's view that admission by the respondent that it indeed owed the applicant the money in question was tacit admission that it owed the money to ZABG under whose authority it had filed the application for summary judgment.

Whilst disputing the existence of a cession, in contrast to the passage quoted above, in court Counsel for applicant submitted that the parties (Curator/Applicant and ZABG) had agreed to work together to recover outstanding moneys. It was in this spirit that the applicant had issued summons in its own name. Furthermore, the founding affidavit, it was argued, clearly indicated that Chikukwa was duly authorised by the Curator to verify the cause of action. The fact that the said Chikukwa was an employee of ZABG, confirmed that the parties were working together. There was therefore no question of the application being improperly before the court, it was argued.

On its part the respondent maintained that the applicant had no *locus standi*. It had lost that capacity on 20 January 2005 when it ceded all its claims to ZABG. In order to regain that capacity, there was need for the Curator to grant it permission. It was further argued that there was no evidence of such permission. The Curator's authority had not been filed (see *Air Zimbabwe Corporation & Others v ZIMRA* HH 96/03.

To further back up its argument, the respondent cited s 54(1) of the Banking Act [*Chapter 20:24*] (the Act) which provides as follows:

> "The issue of a direction in terms of section fifty three shall have the effect of suspending the powers of every director, officer and shareholder of the banking institution concerned, except to the extent that the Curator may permit them to exercise their powers". (My own underlining for emphasis)

There was no evidence of permission to sue having been granted by the Curator under s 54(1) of the Act.

The position of the law, it was argued, had been confirmed by the Supreme Court in *Turst Bank Holdings Limited v Reserved Bank of Zimbabwe & Others* SC 36/05.

Counsel for respondent argued that the case of Marais (supra) could not be relied on because the law in Zimbabwe is clear i.e. where cession has taken place 'the cedent

relinquishes all their rights to institute or continue with legal proceedings over the subject of the cession' (See *Syfrets Mervhant Bank v Jardine & Others* 1999(1) ZLR 124 (H).

The position in *casu,* it was argued, clearly indicated that summary judgment, could not be granted where there was a good defence against the drastic relief sought by the applicant. The defence was that, in law, the applicant had no *locus standi.* After the cession the right to sue went into the hands of ZABG.

Given the fact that the respondent admits owing the applicant the sum of money as claimed in the summons, the issues that need to be answered are:

- whether or not the applicant ceded its rights to ZABG; and
- whether or not if applicant ceded its rights to ZABG, it could legally make this application in its own name - i.e does applicant have *locus standi*.

I shall first deal with the question of cession. It is not denied that the applicant was under Curatorship. It is also not denied that following Curatorship the applicant went into agreement with ZABG. Under that agreement ZABG assumed liability for all the applicant's obligations, including suing for moneys owed to the applicant. This was an agreement of sale whereby the applicant would sell all its assets to ZABG. The preamble to the agreement, which preamble was specifically stated to be part of the agreement, provides great assistance in understanding the intentions of the parties. The agreement should be read together with the provisions of the Act relating to the issue of Curatorship. The applicant acknowledges the impact of Curatorship in paragraph 8 of its Heads of Argument quoted herein at pages 2-3. The applicant confirms that it 'ceded various rights and obligations to ZABG including the claim against respondent'. I think that admission alone settles the issue of cession.

I now turn to the issue of capacity to sue whilst under Curatorship. The answer to that issue is found in s 54(1) of the Act quoted at page 3 herein. Clearly that provision in the Act takes away the applicant's ability to bring an action or application such as this one without the permission of the Curator. There is no evidence of such permission from the Curator in *casu*.

Counsel for the applicant almost persuaded me to accept that such permission was given through Chikukwa as claimed in the founding affidavit. However, apart from the need for such authority to be filed, a careful reading of s 54(1) of the Act will reveal that the permission/authority referred to is that given to 'the director, officer and shareholder of the

cedent' and not a director/shareholder/officer of the cessionary (ZABG). Chikukwa was an officer of the cessionary (ZABG).

Furthermore the cession does not automatically confer agency powers to the cedent. There must, in my view, be a deliberate and visible act by the Curator to create agency. Failure to do so will lead to the Curators legal control and management of the entity placed under Curatorship in terms of the Act being compromised.

The foregoing clearly points to the fact that the applicant, without the permission of the Curator, cannot bring this application before this court. Indeed this point in our law has been confirmed by the Supreme Court in the following two cases:-

1. *Jeffrey Mshimbi & Others v Reserve Bank of Zimbabwe* SC 35/05, and
2. *Trust Bank Holdings Ltd v Reserve Bank of Zimbabwe & Others* SC 36/05.

The fact that the respondent admits its indebtedness should not be allowed to cloud the fact that the applicant has, in bringing this application in its own name, failed to follow the law. The applicant has no *locus standi*.

Accordingly my finding is that the application is not properly before the court and is therefore dismissed with costs.

Coghlan, Welsh & Guest, applicant's legal practitioners
Dube Manikai & Hwacha, respondent's legal practitioners