CHINA SHOUGANG INTERNATIONAL
versus
STANDARD CHARTERED BANK ZIMBABWE
LIMITED

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 22 and 23 November 2011

Opposed Application

P Muzvuzvu, for the applicant
Advocate *F Nyakabawo*, for the respondent

BERE J: The facts which are fairly straightforward and common cause in this matter can safely be summarised as follows:

The applicant is a company duly registered and incorporated in terms of the laws of Zimbabwe. The respondent is a registered commercial bank with a number of branches in Zimbabwe.

The applicant runs two distinct corporate bank accounts with the respondent's Kwekwe branch. As of October 2007 the applicant's two accounts had an aggregate credit balance of forty seven thousand seven hundred and thirty nine dollars and eighty six cents (US$47 739-86).

The applicant's accepted position is that it is a foreign investor company which is legally in Zimbabwe carrying out a specific purpose, viz the refurbishment of the blast furnaces of a Zimbabwean Company called Zisco Steel. The applicant maintained it was not involved in any "foreign exchange" activities.

In October 2007 the respondent's two corporate accounts were debited with an aggregate amount of forty seven thousand seven hundred and thirty nine dollars and eighty six cents (US$47 739-86) without its consent and approval.

The applicant engaged the respondent with a view to recovering its money to no avail hence the instant application.

The respondent's position

The respondent has offered a two-pronged defence to the application filed by the applicant for the recovery of its money.

Firstly, the respondent has contended as a point in *limine* that it is improper for the applicant to file a Court Application to recover a debt that is due to it. The correct position is that the applicant ought to have instituted proceedings by way of summons, so the argument went.

The second point raised in *limine* is that the applicant has targeted the wrong respondent. It was contended on behalf of the respondent that since the funds in issue are held by the Reserve Bank of Zimbabwe, it is against the Reserve Bank of Zimbabwe that this application should have been directed.

Intricably linked to the second point in *limine* is the argument that by debiting the applicant's corporate foreign currency account the respondent was merely complying with a directive issued by the Reserve Bank of Zimbabwe to so act.

In elaboration, the respondent's position is that in October 2007 the respondent together with all other Commercial Banks in Zimbabwe were directed by the Reserve Bank of Zimbabwe to lodge all foreign currency accounts balances in respect of corporate and non-governmental organization accounts with the Reserve Bank of Zimbabwe and to maintain mirror accounts in its own books for purposes of keeping track with these accounts.

I propose to deal with the issues raised by the respondent in seratium.

POINTS IN LIMINE

Was it competent for the applicant to institute proceedings by way of motion proceedings as opposed to issuing out summons?

It is not a rule of thumb that proceedings to recover a debt due must be instituted by way of summons as opposed to motion proceedings. It is clear to me that what determines the nature of the proceedings to initiate is whether or not there are material disputes of facts in the action contemplated.

Where the action contemplated is likely to have material disputes of facts, motion proceedings would be incompetent. Institution of proceedings would have to be by way of summons.

With respect, it is not the correct position of law that a creditor in a proper case for a claim sounding in money owing to him cannot initiate its recovery by way of notice of motion as argued by the respondent's counsel in the instant case.

DE VILLIERS J summed up the correct legal position in *Regal Trading Co*. (*Pvt*) *Ltd* v *Coetzee* after carrying out a survey of a number of South African decisions when he stated as follows:

> "I have come to the conclusion that legally it is not incompetent for a creditor in a proper case to claim money owing to him by way of notice of motion, provided at least that the facts are not in dispute. This does not, however, refer to unliquidated claims for damages. The court has a discretion whether it will allow a creditor to depart from the more usual procedure of *rauw actie*, and that discretion will depend upon all the circumstances of the case. …[1]"

It is correct that application procedure is inappropriate where disputes of facts exist. Where a party alleges the existence of dispute of facts, one is expected to clearly spell out the basis of such dispute as it must be distinct from an "illusory dispute of fact"[2]. That explanation must be rooted in the respondent's opposing papers as opposed to giving them a magnified stature in the heads of argument like what seems to have happened in this case.

I am unable to locate any dispute of facts in this matter except that the parties are unable to agree on the legal implications of the directive given to the respondent. That is certainly not a dispute of facts but a legal issue that must be determined on the papers.

Did the applicant target the wrong respondent?

The agreed facts are fairly simple and straightforward in this matter. The respondent as a commercial banker undertook to keep the applicant's money and pay it out to the applicant upon demand. The respondent failed to do so when called upon to do so by the applicant. The respondent claimed it had transferred the money into another third party's account. There was no privy of contract between that other third party and the applicant. The easy to see party and with whom the applicant had entered into a contractual arrangement was non other than the respondent.

I do not see how the applicant would have initiated any action against the Reserve Bank of Zimbabwe which for all intents and purposes is a stranger to the applicant for purposes of the deposit in issue.

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[1] 1956(1) SA 766 at p 768

[2] Per GUBBAY JA in Zimbabwe Bonded Fireglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (SC) at p 339

I was not persuaded at all by the points in *limine* and it was for the above reasons that I had no hesitation at the hearing in ordering that the matter be heard on merits.

On Merits

The main thrust of the respondent's position is that it debited the applicant's account pursuant to a directive given by the Reserve Bank of Zimbabwe and reference was made to the Exchange Control Regulations of 1996 as the authority behind this directive and s 35 up to s 40 contained in SI 109 of 1996 were relied upon as the specific sections which the Reserve Bank of Zimbabwe relied upon in literally ordering the expropriation of the applicant's deposits.

It will be noted that the legislature in its wisdom qualified the operations of the exchange control regulations by making a specific provision of s 40 (3) thereof which read as follows:

> "40 (3) Orders made under subs 1 shall not have effect until they have been approved by the Minister and published in the Gazette.[3]"

It appears to me such checks and balances were meant to guard against improper use of the exchange control regulations and it follows that non-compliance with this mandatory requirement would render any directive unlawful.

It has not been demonstrated to me by the respondent's counsel that the directive by the Reserve Bank of Zimbabwe was lawful or above board.

It occurs to me that given the special relationship that existed between the respondent and the applicant, the decision by the former to interfere with the applicant's deposits was not one that could have been taken lightly. In my view the onus was on the respondent to ascertain the lawfulness of the Reserve Bank of Zimbabwe's directive instead of blindly or religiously following same. The respondent could have satisfied itself by simply relying on its compliance division within its institution or by simply seeking counsel's views before taking such a drastic action with the applicant's deposits.

Advocate *Nyakabawo* who appeared for the respondent put up a spirited and persuasive argument in support of what she referred to as the predicament faced by the respondent pursuant to a directive given to it by the Reserve Bank of Zimbabwe which required all authorised dealers (respondent inclusive) to transfer to the Reserve Bank of

[3] Section 40 (3) SI 109 of Exchange Control Regulations 1996

Zimbabwe all corporate foreign currency account balances and to maintain a mirror account for tracking purposes.

In support of her position counsel relied on the views of MW Jones and HC Schoeman[4] who described the relationship between a banker and a customer in the following terms:-

> "…. the banker customer relationship is not based solely on contract but imposes many additional duties on banks and customers alike. These duties are established by banking practice and custom, legislation and court decisions. The relationship between a bank and its customer can thus be described as a contract *sui gneris*, or a unique type of contract".

Building on the views of the two authors, the respondent's counsel argued that the directive given by the Reserve Bank was decisive at the material time as the respondent could not have risked losing its banking licence by refusing to comply with the directive in question.

With respect, I am unable to agree with the simplistic interpretation of the relationship between the bank (the respondent) and the customer (the applicant in the instant matter) by counsel. That interpretation is too narrow and dangerous. It is dangerous and risky in the banking business because it turns to depart from the legitimate expectations of the two contractual parties when they entered into a contract, a unique type of contract. I take a very strong view that the respondent had a natural obligation thrust upon it to protect the applicant's deposits. As already highlighted elsewhere in this judgment, that duty entailed *inter alia* verifying the legality or otherwise of the directive given by the Reserve Bank of Zimbabwe because the Reserve Bank of Zimbabwe was not privy to the contractual relationship between the applicant and the respondent.

I am extremely impressed by the view taken by their Lordships in the case of *Attorney General for Canada* v *Attorney General for the Province of Quebec and Ors* when they described the relationship between the bankers and customer in the following terms:-

> "Their Lordships cannot but think that the receipt of deposits and the repayment of the sums deposited to the depositors or their successors as defined is an essential part of the business of banking. The relationship between bankers and customer who pays money into the bank is stated in *Foley* v *Hill* (1) as 'the ordinary relation of debtor and creditor, with a super' added obligation arising out of the custom of bankers to 'honour the customer's drafts'. No question of possession of or property in the deposit

[4] An Introduction to South African Banking and Credit Law, by MW Jones & HC Schoeman, published in 2006 page 4

> arises. The obligation is *mutuum* not *commodatum*. Once a deposit is made there remains only a debt due from the banker to the customer"[5]

It is clear to me, and it must be the most logical conclusion that once money is placed in the custody of a banker, that banker must be held accountable to the depositor of that money. The banker must be able to repay the depositor upon demand. It is as simple as it comes. It requires no complicated interpretation. It therefore naturally follows that the respondent must account to the applicant of the deposits made to it by the applicant. To hold otherwise would be to create chaos in the banking sector. It would be to allow banks like the respondent to ride roughshod on innocent and unsuspecting customers like the applicant and would in addition severely undermine the assumed integrity of the banking sector.

The penalty which the respondent feared would have visited it if it had not blindly followed the directive was specifically provided for. In terms of s 37 the Exchange Control regulations the respondent as an authorised dealer was to be given an adequate opportunity to make representations if it felt it had an obligation to protect the deposits made by the applicant. Not only that but the regulations further provided for the process of appeal by the respondent against any decision by the Reserve Bank of Zimbabwe.

It occurs to me that what the respondent did in this case was to blindly expropriate the applicant's deposits without due regard to the law and this was obviously ultra vires even the constitution of this country.

In conclusion, I find that it is inevitably befitting that the respondent should be ordered to reimburse the monies due to the applicant without putting the applicant into further unnecessary cost of insisting that it joins the Reserve Bank of Zimbabwe in these proceedings for the simple reason that there was never any privy of contract between the applicant and the Reserve Bank of Zimbabwe.

It is up to the respondent to take appropriate action against the Reserve Bank of Zimbabwe if it so desires.

Costs

It was ironic that despite what appears to be reckless execution of its mandate by the respondent in transferring the applicant's deposits to a third party's account without the

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[5] (PRIVY COUNCIL)
Attorney-General for Canada and Attorney-General for the Province of Quebec (and Connected Appeal)
Attorney-General for Saskat-Chewan, Alberta and Mani-Toba 1946 A.C p 33 at 44

consent and or approval of the applicant, the respondent had the audacity to ask for costs on Attorney-client scale against the applicant as its counsel argued for the dismissal of the claim.

I am convinced that the inverse must in fact be true. The respondent has been stubborn in refusing to accede to the applicant's claim. The respondent took an extremely dangerous or casual approach in paying out the applicant's deposits to a third party without the approval and or consent of the latter let alone before attempting to verify the lawfulness or otherwise of the Reserve Bank of Zimbabwe directive.

I believe the conduct exhibited by the respondent is deplorable and must be punished by an appropriate order for costs.

Accordingly I grant the following order:

1. That the respondent pays to the applicant US$38 843-88 and US$8 895-98 being monies unlawfully debited from the applicant's accounts, namely Account number 8740064001800 and 8740064001801 respectively totalling to US$47 739-86 (forty seven thousand seven hundred and thirty nine dollars and eighty six cents) within seven (7) days of this order.

2. The respondent be and is hereby ordered to pay interest at the prescribed rate from the date of this application to date of full payment.

3. The respondent be and is hereby ordered to pay costs of suit at a higher scale.

Masawi & Partners, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners