MUCAL ENTERPRISES
versus
STEWARD BANK

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 20 January, 2 & 25 February 2015

Trial Cause

J Mafume, for the plaintiff
T W Nyamakura, for defendant

TSANGA J: The defendant, Steward Bank applies for absolution from the instance at the close of the plaintiff's case in matter founded on damages for breach of contract. The plaintiff is Mucal Investments. In its summons it seeks payment of US$ 553 544-42 by the defendant. The amount is sought as damages for loss of business between January and July 2013 resulting from the plaintiff's bank account having been frozen by the defendant under circumstances which will be elaborated. Interest is also sought at the prescribed rate from the date of the summons to date of full payment. In addition costs of suit are further sought as between attorney and client.

The damages are founded on the allegation that it was a tacit term of the agreement between the parties that the defendant would honour all cheques and negotiable instruments and transfers properly drawn. The plaintiff, which was then engaged in the business of supplying vegetarian products states through its Director Lion Chirove, that it could not access its account to effect business payments despite demands being made to the defendant and a court order having been obtained.

The plaintiff company was founded in 2006 and its Directors were then Avila Zvenyika and Lion Chirove. In May 2010 two brothers, Bruce Smith and Ahmad Smith who had joined them in a business partnership were made Directors of the Company. As explained in a "to whom it may concern letter" written in October 2010 being non-Zimbabweans and in

the absence of a valid work or residence permit, the new partners could not sign on any bank account. The letter explained that they had been temporarily removed from the company's CR14 form but that they were in essence still directors pending regularisation of their permits.

In September 2011 the plaintiff moved its banking account from CBZ to the defendant Bank. At the time of opening the account its signatories were Lion Chirove and Avila Zvenyika. Mr Bruce Smith was however made a signatory in place of Mr Lion Chirove in a letter to the Bank dated 30 April 2012. It advised that a Board meeting had resolved to appoint him together with A Zvenyika. However on 19 November 2012, following a dispute with the Smith brothers, Avila Zvenyika the company's administrator, had written to instruct the Bank not to process any transactions unless it was authorised by the two Directors as captured on the CR14 form namely herself and Lion Chirove.

From the plaintiff's testimony, what flamed the dispute emanated from the fact that the Smith brothers had clandestinely registered a company in South Africa giving themselves a 100 percent shareholding when the agreement had been to go 50-50 with Mucal Enterprises. They had also registered a company in Zimbabwe giving themselves a 70 percent shareholding and the plaintiff and its director 30 percent. The dispute fully ignited when the Smith brothers proposed that a shareholder's agreement be signed between Mucal Investments and the two brothers as a separate agreement. Under the agreement Mucal enterprises would be owned by the Smith brothers in their South African Company. The plaintiff's Directors, Lion Chirove and Avila perceived this move as designed to swallow and push it out of business.

It was then that the instructions were given to the bank regarding the change of signatories whereby Mr Chirove was reinstated as signatory in place of Mr Bruce Smith.

He further testified that on 21 January when he tried to effect telegraphic transfers for the sum of R98 000-00 to a South African supplier (Fry Group), the defendant refused to honour the transaction and instead froze the account. However it emerged in cross examination that the reason why the bank froze the account was that it had received instructions from Mr Bruce Smith that he had been improperly removed as a Director and signatory. The plaintiff's position is that the internal dispute was none of the bank's business and that it was its responsibility to abide by the instructors of the directors as captured on the CR 14 form. This showed the two directors as himself and his wife Avila Zvenyika. Out of an abundance of caution, the defendant on the other hand had frozen the account until the

dispute had been solved. At the time the plaintiff held $ 24 797-35 in its account as per bank statement presented as Exh S.

That the dispute also set off a chain of events is not denied. Nonetheless the plaintiff's position is that had the Bank risen above the dispute in light of its contractual obligations to its 'true' client, none of the losses subsequently suffered would have occurred. The chain of events is crucial to grasp as it places crucial variables to the otherwise linear causation of losses suffered as articulated by the plaintiff. The events were as follows:

1. On 23 January 2013 the bank refused to effect the transactions following the representations made to it by Mr Bruce Smith that he had been properly removed as signatory.
2. On 6 February 2013 a provisional order was sought by the plaintiff against the defendant in which it sought interim relief compelling the Bank to make accessible to "applicants directors" funds held under account 60101051739101 and to allow the free and unfettered transaction and operation by the applicant of its bank account. The provisional order was granted by consent of all parties. The final order sought to declare Lion Chirove and Avila Zvenyika as having the sole and exclusive right to transact under the relevant account.

   Meanwhile on this very same date as the above order was being granted the Registrar of companies wrote to Mrs Zvenyika stating that they had received a complaint of fraudulent activities concerning removal of two directors (the Smith Brothers) without their knowledge and consent. She was asked as company secretary to clarify the position.

   Criminal proceedings were also pending in the magistrate's court against the plaintiff's director Lion Chirove for fraud.

3. On 14 February 2013 the Smith brothers applied for an interdict under HC 882/13 to prevent Lion Chirove and Avila Zvenyika from accessing the account. The plaintiff's testimony was that this order was not granted as the court took the position that it was not possible to interdict an order granted by consent. Under cross examination it emerged that the crucial reason was also to provide the plaintiff a chance to seek for a final order articulating the rightful directors since what had been granted was simply a provisional order authorising "directors" to access the account.

4. On 11 March 2013 one Martha Chakanyuka a Principal examiner in control of companies signed a statement stating that CR 14 form signed in October 2010 was fake and that the stamps and signatures were fake. She highlighted the procedures for change of Directorship and averred that these had not been followed.
5. On 12 March 2013 Avila Zvenyika in her capacity as company Secretary then replied stating that the claims were unfounded and highlighting that the company is wholly owned by its two directors Lion Chirove and herself. She also explained that the two non-shareholding directors had been removed by a company resolution in October 2010. She also stated that the two Directors namely the Smith brothers had agreed to be removed back then to pave way for a loan since their immigration papers were not in order. She stated that everything had been done above board.
6. On 13 March 2013 the plaintiff's lawyers had written to the Bank regarding the opening of the account which was still not opened.
7. On 22 March 2013 the defendant's lawyers had written to the plaintiff's lawyers advising them of receipt of the statement made by the Registrar of Companies concerning the anomalies that had been detected. They also advised that the dispute needed to be resolved since the court had granted the order on the 6th of February on the basis that that the CR14 now under dispute, had been the correct one. In view of these developments they also pointed out that their client, the bank was unable to accede to the request to activate the account.
8. On July 5 2013 Martha Chakanyuka signed another statement this time essentially confirming that following certain documents being availed that the CR 14 form earlier criticised as improper was in fact proper. She confirmed that the Smith brothers had indeed been removed as directors on 4 October 2010.
9. On 16 July 2013 the plaintiff's directors finally accessed the account having been informed according to the plaintiff through a casual encounter with the Bank's manager that the account had been reopened.

The Plaintiff's perceived loss

The gravamen of the plaintiff's evidence was that over the time when that it was not allowed access to its account, it had contracts with several retail supermarkets as a supplier of vegetarian products. These included shops such as OK, Bon Marche and Spar shops. A

contract with OK dated 2010 was placed before the court as Exh E. The contract itself however did not indicate the value or volume of business between the parties.

From the Ok and Bon Marche shops the plaintiff valued its business for the relevant period when its account was frozen at $50 000-00 with a profit of **$26 000-00** after expenses had been paid. Exhibits H1-H6 were handed in. Three of these were statements generated by the plaintiff's director while another three were said to be generated by OK although they was no officially verification of these documents.

Also presented were the plaintiff's own calculations of business with the Spar shops. (Exhibits G1-G5) However, the plaintiff did not produce any evidence or proof that business was actually being conducted constantly or on a monthly basis.

The plaintiff's director also presented its projections of business it was set to do with TM and Pick n Pay. It said the value lost amounted to approximately **$74 000-00**. In addition the plaintiff's company had a credit facility with TN bank for up to $ 4000-00 per month and was doing business with TN Harlequin. (Exhibit F)

It terms of lost business it had also secured an arrangement to supply the Seventh Day community with vegetarian products at its Adventist camp sites. With 52 campsites attended by about 5000 people per camp annually, the plaintiff's estimation was that it lost a potential of US$ 5000-00 per campsite giving a total loss of **$260 000-00.**

In July 2012 the plaintiff had gotten another product for distribution from Good Hope International Enterprises for soya milk. It alleged that it would have been a sole distributor and on arrangement would have been a regional distributor. However no proof of this averment was produced. At the time the plaintiff stated it had received an order by consignment from Good Hope for $30 000-00. This would have been serviced from the account. The plaintiff stated that overall it was expecting during the period its account was frozen a total of US$ 495 000-00 worth of purchases with Good Hope and from this amount $ 693 000-00 worth of sales thereby giving it profit of **$198 000-00**. The plaintiff later clarified in cross examination that it was still negotiating this contract and therefore no contract could be availed. However it had received the order by consignment for $30 000-00 though again no proof was produced. From the Fry's Group, business lost over the seven month period was estimated to **$102 712- 00** after expenses.

The company according to its Director had also made inroads into the possible supply of meat free products to Catholic schools around the country under which he estimated it would have made at least $20 000 - $25 000 per month.

All the above was the kind of business the plaintiff said it lost on probabilities. The devastating consequence arising from the defendant's perceived breach of contract was not only loss of income according to the plaintiff's director but also termination of contracts. The distributorship business with the Fry Group was terminated in April 2013 and with Good Hope in September 2013. It lost all its suppliers because it failed to pay them. It lost all its clientele whom it failed to service. It was according to him a sole distributor of vegetarian products. It was also working with a 'niche market'. It also lost its reputation in the process. By December 2012 the company, according to its Director had grown to 12 employees. Today it has none. The plaintiff blames the defendant for the sum total of these woes because it could access its account to conduct its business.

Interrogation of the loss in cross examination

The plaintiff was quizzed by the defendant's counsel Mr *Nyamakura* on the company's financial accounting procedures. The plaintiff's director conceded that that he is fully aware of the need to keep proper books of account by any company. He agreed that such books would indeed vividly indicate the company's flow of business and any profit and loss made. He was also in agreement that annual tax returns would clearly indicate the actual profits made for tax purposes. He said all such documentation existed with respect to the plaintiff company but admitted that they had not been tendered as evidence. He did not dispute that a bank can place administrative requirements over those who operate accounts and that it is entitled to refuse access where it has concerns as to the authenticity of any representative. However he was adamant that the bank acted improperly, especially as it had been given the necessary information as who the directors were.

The plaintiff's director also confirmed that indeed the Smith brothers had come in as financial partners as the company was going through financial difficulties at the time. Their terms were to be shareholders on a 49-51 percent basis. The other condition was to secure them as signatories to the account. It emerged from cross examination that certain monies invested by the Smith Brothers had not been paid back by the plaintiff. The Smith brothers were therefore seeking to protect their investment. He also agreed that no final order had been sought to the provisional order that had been granted by the court on 6 February 2013. He also conceded that the day that the order was granted on 6 February 2013 was also the very day that the Registrar of Companies had written to the other director, Ms Zvenyika, seeking an explanation of allegations of possible fraudulent removal of directors. This information

had not been before the court at the time that it was granting the provisional order. He also did not deny that the Smith brothers had also sought an urgent chamber application to stay operation of the provisional order granted by the court on 6 February 2013. He further agreed that he had not taken any concrete action to actively challenge the statement and that the statement was withdrawn in July against a backdrop of investigations the Registrar had carried out. He did however maintain that the statement was challenged when he was being prosecuted. Although his view was that the provisional order granted on 6 February 2013 was clear as to its directive regarding the re-opening of the account. He did concede that it was the final order that specifically sought to confirm himself and Ms Zvenyika as the true Directors of the Company. He admitted that no action was taken on his part to seek a final order as directed by Justice PATEL in HC 882/13 which would have put an end to the dispute at least as way back as March 2013. He also admitted that on the same day that bail conditions were relaxed to allow him to operate the account was also the same day that the registrar of companies made the allegation that there was possible fraudulent activity.

The application for absolution

The defendant has applied for absolution from the instance largely on the basis that the plaintiff has essentially failed to make out a case against the defendant that is deserving of a reply. It is also argued that the plaintiff had failed to prove any breach of contract entitling it to special damages.

In terms of general principles on absolution from the instance the case of *United Air Charter* v *Jarman* 1994 (2) ZLR 341(S) condenses the position as follows:

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which the court, directing its mind reasonably to such evidence 'could or might (not should or would) find for him**."**

The above principle draws on cases such as *Supreme Svc (1969) (Pvt) Ltd* v *Fox Goodridge (Pvt) Ltd* 1971 (1) RLR 1*; Lourenco* v *Raja & Steam Laundry (Pvt) Ltd* 1984 (2) RLR 151. The principles have also been canvassed in a number of cases such as *Walker* v *Industrial Equity Ltd* 1995 (1) ZLR 87 (S); *Standard Chartered Finance Zimbabwe LTD* v *Georgias & Anor* 1998 (2 ZLR 547 (H)*; Dube* v *Dube* 2008 (1) 326

In seeking to put the defendants to its defence it is argued by the plaintiff that the bank knew who the Directors were as these were indicated on the CR 14 form. It is also argued that as the account in question was the plaintiff's sole business account it should have been apparent that it would suffer loss if it was not permitted to transact under that account. The dispute, it insists, could have been solved at a later stage. It argues that for reasons such as these which are common cause, it has done enough to put the defendant on its defence.

The plaintiff also lays emphasis on the fact that at this stage it is not about whether the evidence is true or false. In its view absolution should only be granted where it has failed to establish an essential element of its claim. The plaintiff emphasises its contractual relationship with the defendant; the fact that the defendant breached the contract. In support of this the plaintiff points out that the money would have been paid to suppliers and not to themselves.

In opposing absolution from the instance the plaintiff places reliance on the position articulated in the case of *Standard Chartered Finance Zimbabwe LTD* v *Georgias & Anor* 1998 (2 ZLR 547 (H) that in considering absolution from the instance a judicial officer should always lean in favour of the case continuing. If there is reasonable evidence on which the court might find for the plaintiff, the case should continue.

However the preponderance to 'lean in favour of' is not the same as saying a judicial officer must always lean in favour of the case continuing. It is in cases where there is doubt that the court should lean in favour of continuing as SMITH J emphasised in the *Standard* case (*supra*). Where a judicial officer has no doubt in their mind from the evidence submitted, then by all means absolution should be granted. The key issue for consideration therefore is whether sufficient evidence has been placed before the court upon which the court might find for the plaintiff.

Factual and legal analysis

While damages are sought against the defendant as the unitary cause of the loss of business suffered by the plaintiff, the facts informing the claim are far from being one-dimensional. The evidence that has been placed before the court indicates that an internal dispute and competing claims within the plaintiff company where at the heart of the chain of converging events that led to operational problems for the plaintiff company including the freezing of its account. Yet only one cause, the freezing of its account is isolated by the plaintiff as leading to his perceived loss. Just because a plaintiff strongly believes that a factor

that he has isolated is the predominant cause of its problems does not exclude other explanations which have a bearing on the matter from being considered by the court in deciding whether sufficient evidence has been placed before it to exclude their impact.

Where a problem is multiply caused as in this case, the question of whether or not the court might find for the plaintiff on the evidence adduced, of necessity depends on whether the evidence placed before the court, on a balance, sufficiently rules out other explanations as causes for the loss suffered by the plaintiff. In other words, if from the evidence adduced it cannot be inferred on a balance of probabilities that the single behavioural event isolated by the plaintiff was the cause of its loss, then the evidence is simply not sufficient. The evidence adduced must on a balance of probabilities sufficiently pry apart other variables such as to leave the one plaintiff relies on as the dominant cause. If at the close of the plaintiff case insufficient evidence has been placed before the court to support an averment, this will not change even if the defendant is put to its defence.

What this court has before it at the conclusion of the plaintiff's case is a convergence of multiple factors, predominantly emanating from events within the plaintiff company that complicated the issue for the plaintiff. The defendant's actions were largely responsive to such outside stimuli as opposed to being the dictator of them. Also the defendant's actions in refusing to release the funds have to be put in perspective of the events that unfolded. The bank's client was the corporation. There was a dispute regarding the directors of the corporation. A criminal complaint was made by a competing director. The Registrar of companies at first also confirmed the allegations of fraud and it was only in July when their initial position was reversed. Although a provisional order was obtained it is instructive that on the very day of its obtainment the dispute escalated rather than abated. The Bank was essentially faced with divergent claims to the account by two feuding parties, each claiming legitimacy.

The plaintiff argues that the defendant breached its contract in failing to pay on demand. Yet in light of the facts the Bank would equally have found itself liable to a claim from either of the competing parties to the account for wrongfully paying out of the account or unauthorised payment since each side had laid claim to the account. There was no breach since its client was the corporation and competing claims had been placed before it by two sides within that corporation relating to its directorship. Only where the dispute was resolved in terms of clarity of directors could the bank safely pay out. Only a foolish bank would have paid out to any of the claimants without a final court order as to the true status of each of the

claimants. While the defendant may have acted on the strength of the documents written by the Registrar of Companies it was not the author of these documents.

The plaintiff also rests its argument for dismissal of absolution on the basis that it suffered damages as a result of the breach. The case of *Trust Bank of Africa Ltd* v *Marques* 1968 (2) SA 796 (T) is cited in support of the contention that a bank which fails to honour cheques when funds are available risks a claim of damages. The plaintiff argues that the contracts it placed before the court were sufficient namely those from Ok Zimbabwe and the TN credit facility. Finally the plaintiff also argues that its loss was not remote.

Special damages are ordinarily regarded in law as being too remote to be recoverable. They are claimable in situations where it can be deduced that the parties actually or presumptively foresaw that they would probably flow from a breach of contract and were within the contemplation of the parties. As stated by GUBBAY CJ as he then was in *United Air Charter* v *Jarman* 1994 (2) ZLR 341(S) in determining whether they are claimable it is of assistance to look to (a) the subject matter and terms of the contract itself; (b) the special circumstances known to both parties at the time they contracted. I do not think that damages arising from a quarrel among the directors was within the contemplation of the parties. In any event the core point remains whether sufficient evidence has been placed before this court to justify such damages.

One crucial manner a purportedly dominant claim, particularly one for damages is strengthened is by way of statistical evidence to support it. Being a claim of special damages, the plaintiff had the responsibility to prove its quantum of damages by placing all relevant evidence before the court in order to prove its claim. Such special damages will not be granted if they are too remote. The defendant argues that the evidence placed before the court was too scanty. No proof of invoices or proof of orders that were received and needed honouring by the bank were submitted to the court by the plaintiff. These would have provided irrefutable proof of business that was actually lost. Also the plaintiff did not produce any evidence which would have supported their position that the money that the defendants refused to pay would have been going to suppliers and not to themselves.

In seeking absolution from the instance, the defendant further argues that the plaintiff's books of accounts and tax returns would have been proof of the plaintiff's profitability as alleged by its Director. The plaintiff's director in cross examination averred to the existence of these documents but admitted that they had not been brought to court. In its written arguments against absolution the plaintiff then stated that the audited accounts were

taken by the Smith Brothers and that the tax returns are filed with the tax man and can always be taken into account in damages. Even if the plaintiff's argument is accepted that the books were taken away and that the tax returns were filed it cannot in my view escape the responsibility of ensuring that these were placed before the court given that they form the heart of the dispute. It is not for the defendant to go and extract tax returns for the plaintiff. That was clearly the plaintiff's own responsibility. It is also not the plaintiff's averment that the soft copies of the accounts are what was taken. They simply state that the accounts were taken by the Smith brothers.

As argued by Mr Nyamakura, where evidence is available that would assist the court to properly quantify damages and it is not produced, then the matter must fail and the defendant must be absolved from the instance. The case of *Monumental Art Co.* v *Kinston Pharmacy* (Pty) Ltd 1976 (2) SA 111 was cited in support of this contention. Also a party who shies away from producing evidence cannot escape the inference that he knows that such evidence will not be favourable to him. The cases of *Ntsomi* v *Minister of Law & Order* 1990 (1) SA 512 (C); *Tshishonga* v *Minister of Justice & Constitutional Development and Anor* 2007 (4) SA 135 were cited by the defendant.

If accurate statistical evidence that is representative of the company's steady growth and success of over the years as exemplified by tax returns was available, then it should have been obtained. How else would the court know from the outset that it is not dealing with isolated phenomenon in so far as the plaintiff's claims of a steady growth of the business over a number of years is concerned? The plaintiff Director's own testimonial evidence of growth and projected profits is not the kind of evidence that the court has in mind as constituting "sufficient evidence upon which the court might find for the plaintiff". In cases of this nature where loss of business is alleged, tax returns and audited accounts constitute the type of evidence that would on the face of constitute a sufficient basis for a claim upon which the court might find for the plaintiff. Therefore on the issue of damages for loss of business the strength of the plaintiff's evidence is essentially 'dead in the water' as a result of the failure to place the kind of credible evidence that one would expect of a company as pointed out by the defendant in its application for absolution from the instance.

At the close of the plaintiff's case the preponderance of evidence did not point to the defendant as having been the actual cause of its loss or even being in any way the major cause of the plaintiff's loss. I am satisfied that there was insufficient evidence on which a reasonable court could or might find for the plaintiff.

The defendant seeks that costs be awarded on a higher scale especially on the grounds that the plaintiff had ample time to put all its evidence together in preparing for trial and as such it has been put through an unnecessary expense. Costs, in general recompense a successful party for expenses to which he has been put in defending a claim. They are generally awarded on an ordinary scale. Courts are reluctant to ward costs on a higher scale because they are highly punitive. It would seem to me that the overall weakness of the plaintiff's case has emerged from the totality of having his day in court to present his case as he is entitled to. It would therefore be in my view tantamount to exercising hindsight to land him with costs on a higher scale.

The application for absolution from the instance succeeds with costs on an ordinary scale.

Mupanga & Bhatasara, Plaintiff's Legal Practitioners
Mtetwa & Nyambirai, Defendant's Legal Practitioners